THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M Kassem**

Respondent: **North Tees and Hartlepool NHS Foundation Trust**

Heard at: **Teesside Justice Hearing Centre** **On:** **1 to 18 September 2020 with deliberations on 21, 23, 24 and 25 September, 26 and 27 November 2020, and 14 January 2021**

Before: **Employment Judge Morris**

Members: **Mr S Moules**
Mr S Wykes

Representation:
Claimant: **in person**
Respondent: **Ms Levene of Counsel**

RESERVED JUDGMENT ON LIABILITY ONLY

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent directly discriminated against him on grounds of race contrary to sections 13 and 39 of the Equality Act 2010 is well-founded to the extent set out in the Conclusion section of the Reasons below.

2. The claimant's complaint that the respondent harassed him contrary to sections 26 and 40 of the Equality Act 2010 is well-founded to the extent set out in the Conclusion section of the Reasons below.

3. The claimant's complaint that the respondent victimised him contrary to sections 27 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

4. The claimant's complaint that the respondent subjected him to detriment on the ground that he had made a protected disclosure contrary to section 47B of the

Employment Rights Act 1996 is well-founded to the extent set out in the Conclusion section of the Reasons below.

5. The claimant's complaint that the respondent made an unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

6. This case will now be listed for a private preliminary hearing at which consideration will be given to the issues to be addressed at a future remedy hearing in relation to those of the claimant's complaints in respect of which he has been successful as set out above.

REASONS

Representation and evidence

1. The claimant appeared in person, gave evidence and called Mr M Tabaqchali, retired Consultant Surgeon at the respondent, to give evidence on his behalf. The claimant also submitted a statement from Ms N Robinson, Colorectal Clinical Manager at the respondent, which the Tribunal read but could not give great weight to given that she was unable to attend the Hearing due to ill-health.

2. For personal reasons, which the Tribunal accepted, Mr Tabaqchali was unable to attend the Hearing to give evidence in the usual way. In accordance with rule 46 of the Employment Tribunals Rules of Procedure 2013, by consent, Mr Tabaqchali's oral evidence (the parties and the Tribunal having read his witness statement) was given over a speaker-telephone.

3. The respondent was represented by Ms R Levene, of Counsel, who called eleven past or present employees of the respondent to give evidence on its behalf: namely, Mr A Sheppard, Chief People Officer; Dr B Gopinath, Consultant Surgeon; Ms S Thompson, retired but Associate Director, Operations (Emergency and Anaesthetic Care Service) at the time material to this case; Mr P Bhaskar, Consultant in General Surgery; Mr D Dwarakanath, Medical Director, Deputy Chief Executive and Consultant Gastroenterologist; Mr C Tulloch, Deputy Medical Director; Ms L Johnson, Workforce Business Manager; Ms T Lynch, Workforce Business Partner at the time material to this case; Mr M Shanmugam, retired Consultant Surgeon; Mr A Agarwal, Consultant Surgeon and Clinical Director; Ms R Dean Care Group Manager for Collaborative Care at the time material to this case.

4. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising well-over 3616 pages, which was added to during the course of the Hearing; the Tribunal accepting that certain additional documents upon which the claimant sought to rely (as referred to in his email to the Employment Tribunal dated 25 August 2020) could be introduced as they were potentially relevant to the issues in this case notwithstanding objections raised on behalf of the respondent. The

numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

Anonymity

5. The Tribunal considered whether the identity of persons referred to in these proceedings should not be disclosed to the public. In doing so, we had regard to rule 50 of the above Rules of Procedure, Articles 6, 8 and 10 of the European Convention on Human Rights, guidance given in decisions such as British Broadcasting Corporation v Roden UKEAT/0385/14 and F v G [2012] ICR 246 (to which we were referred by Ms Levene), Fallows & Anor v News Group Newspapers Ltd (Practice and Procedure: Restricted Reporting Order) [2016] ICR 801 and Hill v Lloyds Bank Plc (Disability Discrimination) [2020] UKEAT 0173/19/0603. In line with that latter decision, we invited submissions from the claimant and Ms Levene as to whether the identity of any person should not be disclosed, which we brought into account in coming to our decision.

6. We decided, as indeed Ms Levene had submitted, that those persons who had been witnesses in these proceedings should be named but those who had not been witnesses but had been referred to by those witnesses should not be named. We were minded to adopt Ms Levene's proposal that such persons should simply be referred to as, for example, "Surgeon 1, Surgeon 2, etc" but in adopting that approach the initial draft of our reasons became extremely difficult to follow. As such, with one exception we have referred to such persons by their title and the first initial of their surname (or where more than one person has the same initial for their surname, to use also the first initial of their first name) albeit recognising that someone with sufficient knowledge of the respondent might be able to form a view as to whom reference is being made. The exception is in relation to the individual whom we have identified as Mr Q; the reason for that will be apparent on reading our Reasons below.

The claimant's complaints

7. The claimant's complaints were as follows:

    7.1 Direct discrimination on grounds of race contrary to sections 13 and 39(2)(d) of the Equality Act 2010 ("the 2010 Act").

    7.2 Harassment contrary to sections 26 and 40 of the 2010 Act.

    7.3 Victimisation contrary to sections 27 and 39(4)(d) of the 2010 Act.

    7.4 Having been subjected to detriment by the respondent on the ground that he made a protected disclosure contrary to section 47B of the Employment Rights Act 1996 ("the 1996 Act") with reference to sections 43A to 43C of that Act.

    7.5 Unauthorised deduction from wages contrary to section 13 of the 1996 Act.

The issues

8. The parties had produced a list of issues running to 8 pages, which being a matter of record need not be set out fully in this part of these Reasons. Instead, they will be addressed in our consideration below and, where relevant and appropriate, the paragraph numbering in the agreed list of the principal issues (but not the alleged breaches or policy or breaches of confidentiality) has been used as a side heading in our findings below. Suffice is to say that the issues address the five complaints of the claimant set out above and add an additional element of whether certain of the claimant's claims had been brought 'in time' (allowance being made as necessary in respect of Early Conciliation) and, if not, whether time should be extended and if so for what period. A general point that the Tribunal first records in relation to the agreed list is that in connection with an application by the claimant for disclosure of certain documents in August 2020 an Employment Judge required the respondent's solicitor to produce the list and agree it with the claimant overnight, which he did, albeit only being able to send the draft list to the claimant at 10.00pm. In these circumstances, and in light of the guidance that the Tribunal draws from case law such as Saha v Capita plc EAT 0080/18 and Mervyn v BW Controls Ltd [2020] EWCA Civ 393 to the effect that a tribunal is not obliged to stick slavishly to the parties' agreed list of issues, it allowed some limited latitude to the claimant to depart from the agreed list. On points of detail in respect of the list of issues, the Tribunal records that the claimant withdrew, first, issue 2j in respect of his complaint of direct race discrimination, secondly, the alleged breach 1e of the Whistleblowing and Disclosure Policy and, finally, in respect of both issue 4d of his victimisation complaint and issue 8h of his whistleblowing complaint, the deferment of his revalidation in January 2019.

9. From time to time during the Hearing the claimant sought to expand upon the issues in the agreed list to which Ms Levene objected albeit accepting that the list was not a straitjacket but the respondent needed to know the case it had to answer. When deciding whether to allow the claimant to expand upon the issues the Tribunal reminded itself that, as set out above, it is now well-established that a tribunal is not necessarily hidebound by an agreed list of issues and should depart from such a list where necessary to determine a claim properly: see Saha and Mervyn. In this connection, the Tribunal did not agree that the claimant could expand the fairly narrow issue in subparagraph 2f of his complaint of direct discrimination. It did agree, however that subparagraph 2r of the complaint of direct discrimination was sufficiently wide to enable the claimant to question Mr Sheppard on the point of there not having been a separate pre-meeting (as referred to in the respondent's Guidance for Manager in relation to job planning appeals (1876)) because the Tribunal considered that, if that procedure had been followed, the outcome could have been different.

Consideration and findings of fact

10. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact

that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

10.1 The respondent is an NHS Foundation Trust providing a variety of healthcare services throughout the North Tees area including accident and community services. It has hospitals in Hartlepool ("University Hospital Hartlepool" or "UHH") and Stockton on Tees ("North Tees").

10.2 The claimant is a general surgeon from Iraq. He was appointed to work for the respondent in August 2002. Since 2008 his position has been as an Associate Specialist Surgeon. He works within the Directorate of Surgery, Urology and Outpatients ("the Directorate") within which there are five departments: Upper GI, Urology, Colorectal, Emergency and Breast. The claimant's employment was without incident until March 2011. Indeed he has had no patient complaints, claims, serious incidents or serious complications reported against him throughout his employment.

Direct discrimination – issue 2a

10.3 In early 2011, in connection with his on-call duties, the claimant was working as a registrar with Mr HB, Upper Gastrointestinal ("Upper GI") Consultant Surgeon. Mr HB fell ill and subsequently withdrew from on-call work prior to his retirement. At this time, the claimant was moved to do Mr HB's on-call duties within the Breast Team. The Tribunal accepts Mr Bhaskar's evidence that the reason for this was that the Upper GI team had two consultants and therefore required two middle grade doctors to work with them but had three including the claimant. One of the other doctors was a registrar from the Northern Deanery and one a teaching fellow appointed by the Education and Learning Department. Those organisations required those two doctors to work within the Upper GI team and, therefore, the claimant was offered a choice to undertake his on-call work in either the Colorectal Team or the Breast Team. He chose to work with Mr A in the Breast Team.

Direct discrimination – issue 2b

10.4 Following Mr HB's retirement in 2011, the claimant was temporarily allocated to cover the elective sessions of Mr HB's job plan. A new Bariatric and Upper GI surgeon, Mr R, was subsequently appointed as a replacement substantive consultant for Mr HB. In accordance with usual practice when a consultant is being replaced with a like-for-like post, Mr Gopinath produced a job plan for Mr R using Mr HB's job plan for this purpose. A consequence was that the elective sessions that the claimant was doing as cover for Mr HB were to become part of the job plan for the new consultant with the result that the claimant's elective sessions would be reduced.

Direct discrimination – issue 2d

10.5 The reduction of the claimant's elective sessions was discussed at a job plan review meeting between the claimant, Mr Bhaskar, Mr Gopinath and Ms Dean in March 2011. At the meeting the claimant explained that he needed a number of independent clinical sessions to maintain his Associate Specialist post. The claimant maintained that at this meeting Mr Bhaskar threatened that if he did not accept the job plan there would be no job available for him in the Directorate. The Tribunal is satisfied the there was no direct threat to this effect albeit that Mr Bhaskar might have indicated that this was the job plan that was on offer.

Direct discrimination – issue 2e

10.6 On 7 December 2011 the claimant wrote to Mr Gopinath seeking to be involved in the recruitment process for a middle grade surgeon as he considered that would impact upon SAS doctors (of whom the claimant was one) within the Department and the Trust as a whole. Mr Gopinath replied explaining that the job was a Clinical Fellow position, would not be converted to a SAS job until the future and, therefore, did not impact on any SAS doctors (135). The Tribunal accepts this explanation of Mr Gopinath, supported as it is by Mr Bhaskar. Mr B was appointed to this particular post.

Harassment – issue 1b

10.7 A meeting of the Upper GI Service Line Management ("SLM") took place on 23 February 2012. At that meeting, the claimant put forward proposals to address problems of bile leaks in surgery suggesting that ties were more secure than clips. The claimant's complaint is that Mr Gopinath deleted the claimant's proposal from the minutes of the SLM meeting. While it is right that Mr Gopinath amended the wording of the minutes, the Tribunal is satisfied that that was only to avoid repetition and the substance of the claimant's proposals were maintained in the amended minutes (147/150).

Harassment – issue 1a

10.8 Mr Gopinath cancelled the claimant's theatre list for 27 February 2012. The circumstances were that one of his patients required bariatric surgery and, in preparation, had been on a liver shrinkage diet for two weeks previously. Mr Gopinath found that he had no assistance for his theatre session so decided to cancel the claimant's session so as to use the services of the claimant's registrar in assisting in the bariatric case and prevent it from being cancelled. The Tribunal accepts this as being a reasonable explanation albeit noting that Ms Dean acknowledged that this should have been discussed with the claimant (145).

10.9 The claimant continuing to have the necessary number of independent clinical sessions to maintain his Associate Specialist post (referred to above) was agreed but only after the matter had been referred to Mr E (the previous Medical Director of the respondent) who met the claimant and Mr Bhaskar on 20 April 2012 (153). From that point, therefore, the claimant's elective sessions were maintained as is shown in his job plan that was updated after the meeting with Mr E (134). At that meeting the claimant made certain allegations about Mr Gopinath appointing and favouring his friends. Mr Bhaskar offered to arrange a mediation meeting between the claimant and Mr Gopinath (which they attended) and to encourage the claimant to attend courses in Upper GI surgery and to apply for Article 14; that being a route to gain entry to the specialist consultant register and thence appointment to a substantive consultant position.

Direct discrimination – issue 2c

10.10 A footnote to the claimant's updated job plan (134) records that the claimant was only to be allocated the bariatric theatre sessions "when other Middle grade is on-call/flexible session". The Tribunal accepts the explanation of Mr Bhaskar that this was because, unlike the other Middle grade doctors, the claimant already had a fair share of bariatric surgery and Mr Bhaskar was seeking to ensure an equal distribution of such work.

Direct discrimination – issue 2f

10.11 The claimant was included in the theatre list for 3 December 2012. [*Note, there was some confusion as to the actual date of this incident. At one point it was suggested that it had occurred in February 2012 or, more specifically, on 27 February 2012 but that is the date of the incident referred to in paragraph 10.8 above. Given the confusion, the Tribunal has retained this date of 3 December 2012*] Mr Gopinath gave instructions that he should be removed from the list and replaced by Mr RJ. Mr Gopinath's evidence was that this may have been because he had only recently started doing bariatric surgery and he wanted Mr RJ to assist him as Mr RJ had previously worked as a registrar in bariatric surgery. It was pointed out to Mr Gopinath, however, that it was the claimant's turn to be in the bariatric theatre according to his job plan; also, Mr RJ was doing night duty. The claimant was therefore put back on the list to assist Mr Gopinath who then requested Mr R to take over the responsibility of doing the weekly timetable so as to prevent further issues arising (158 and 160). The Tribunal accepts this explanation of Mr Gopinath who apologised to the claimant about this matter during the mediation that they had subsequently, which is referred to at paragraph 10.9 above.

Direct discrimination – issue 2g

10.12 In September 2014, Mr Gopinath was involved in the appointment of a locum Upper GI surgeon from outside the Trust to cover emergency on-call. The claimant has asserted that Mr Gopinath recruited Mr RJ because he was a close friend. The Tribunal accepts the evidence of Mr Gopinath, however, that they were not close friends and although Mr RJ was his trainee there was a formal interview and selection process involving three applicants following which the panel appointed Mr RJ. The claimant also complains that he was not given the opportunity to step in to work independently in emergency surgery but the Tribunal notes that he did not apply for appointment to this post.

10.13 In March 2015, the claimant commenced a 12-month locum consultant position for on-call emergency surgery as cover for part of the role of Mr A who was on a career break. At the same time, Mr T was made locum consultant for breast surgery to cover that element of Mr A's role. There is no evidence before the Tribunal that there was an interview process in respect of the claimant's appointment. The formal arrangements in respect of that appointment are contained in a letter from Ms Dean to the claimant dated 29 May 2015 (308). Two points in that letter are relevant to the issues in this case. First, at his request the claimant would continue to undertake his middle grade elective day time and emergency surgical night time rota commitment at middle grade level in accordance with his existing timetable. Secondly, he would "receive 15.5 PAs on your current salary of £[*x*]pa as an Associate Specialist and an additional 1 PA on a consultant salary of £[*y*]".

Direct discrimination – issue 2h

10.14 On 23 February 2016, following a review of Clinical Leads, Ms Dean sent an email to the surgeons in the Directorate attaching a revised procedure for Clinical Leads and details of who would perform those roles and other roles (175). The claimant's complaint is that he was not notified of this review. It is right that the claimant's name is missing from the list of those who were sent this email (which actually seems to have been sent by Ms Dean's secretary) but the Tribunal is satisfied that that was a simple oversight. In any event, Mr Tabaqchali forwarded the email and attachment to the claimant on 29 February 2016.

10.15 This led to the claimant sending an email to Mr Bhaskar and others on 29 February 2016 (178) in which he stated that he would like to apply for the position of emergency services lead and that his other main interest was to lead the foundation doctors. In each case the claimant provided brief details of why he was suitable for either of these posts. The Tribunal is satisfied that this amounted to a clear expression of interest by the claimant in these roles.

Direct discrimination – issue 2i

10.16 On 8 July 2016 a Directorate meeting took place at which roles and responsibilities of individuals were discussed. The claimant did not attend the meeting although he was on the circulation list. Arising from that meeting, Mr Agarwal sent an email to consultants and middle grades on 18 July 26 outlining their individual roles and responsibilities (180A). The claimant was allocated responsibility as lead for 7 Day Services with support from Mr M while he was to be the lead for the Commissioning Quality and Innovation ("CQUIN") framework with the claimant as his support. In concluding his email, Mr Agarwal stated, "Any corrections/comments/issues relating to above please let me know". The claimant did not comment on the responsibilities that had been allocated to him.

10.17 The claimant's evidence was that he had been allocated the role of lead for 7 Day Services to push him out from the mainstream business of the Directorate and involved little more than attending what he described as being a "non-meeting", the business of which was directed from national level. Mr Agarwal's evidence was that these allocations to the claimant actually brought him into the Directorate and allowed him to contribute to vital committees on its behalf. The Tribunal accepts Mr Agarwal's evidence given that the concept of seven-day working in the NHS was and remains an important initiative. It is right that the effect of allocating these responsibilities to the claimant was to give him a role outside the Directorate (in contrast to the two roles in which he had expressed an interest) but there is no evidence before the Tribunal that that was the purpose of these allocations. In his witness statement Mr Bhaskar explained the process for the selection of clinical leads as being that if there was only one applicant that would be taken as a unanimous decision and the person would be appointed. If there were two or more applicants a vote would be conducted. He did not expand upon this, however, by explaining who had applied for the various lead roles and whether there had been a vote. The Tribunal also notes that this evidence contrasts with that of Mr Agarwal that at the meeting on 8 July 2016 a consensus had been reached. Whatever the process, the Tribunal is satisfied that this review of and allocation of responsibilities was not well-handled. There had been a clear expression of interest on the part of the claimant in either of the two roles referred to in his email of 29 February and there was no explanation of why he had not been appointed.

10.18 A related complaint of the claimant is that attending meetings of the 7 Day Services initiative would divert him from his patients. The Tribunal accepts the evidence of the respondent's witnesses, however, that the meetings took place only every 2 to 3 months and could have been accommodated, and that if there were to be a conflict with his patient responsibilities the claimant could, as lead, send a substitute such as Mr M.

Harassment – issue 1c

10.19 An issue arose in August 2016 when a patient, of whom the claimant was the consultant, had a massive bleed from a stomach ulcer. The claimant's complaint is that Mr Agarwal repeatedly asked him to provide a statement as part of a Datix investigation when he had not witnessed the incident. The Tribunal interjects that Datix is explained in the following terms. It is said to be the reporting system for recording clinical incidents or 'near misses'. It allows for the sharing of the details of incidents; enabling weaknesses in the system to be identified, customs and practices to be changed and staff to be retrained where necessary. If a Datix is submitted it automatically 'triggers' the sending of an email to a large number of persons who have a legitimate interest in being notified.

10.20 It is right that the claimant was repeatedly requested to provide such a statement as part of a Datix investigation but that was initially a request from Patient Safety (186), which was twice repeated, and not from Mr Agarwal. He only came involved when the claimant refused to provide a statement to Patient Safety. Given Mr Agarwal's position as Clinical Director, the Tribunal considers his involvement to have been appropriate. The Tribunal notes that, in fact, the claimant did then provide something of a statement in his email of 25 September 2016 (183) in which he explained that his involvement had been in theatre as he had done the emergency laparotomy from which the patient had made a good uneventful recovery. He concluded his email by expressly stating, "Please Accept this as Statement". The Tribunal notes, however, that the initial request from Patient Safety asked the claimant "to complete Appendix 2 of Policy RM19" from which it would appear that there is a formal process involved with which the claimant did not comply. That said, it might have helped if, when Mr Agarwal received the claimant's email of 25 September and his request that it be treated as his statement, he had responded to the claimant to this effect: i.e. that he needed to be complete the formal Appendix 2.

Harassment – issue 1d

10.21 On 7 December 2016, the claimant was on emergency on-call in the hospital when a patient deteriorated and required emergency surgery. He called Mr Q who was the consultant on-call. Mr Q refused to attend the hospital and told the claimant to deal with the situation himself. As such, the claimant took the junior doctor off the ward to assist him with the emergency surgery. His having done so was drawn to the attention of Mr Agarwal the following morning by the ward manager as the ward had been left without a doctor for a few hours. The ward manager also raised a Datix about this incident, reference w75361 (193A).

10.22 In a corridor in front of colleagues and junior doctors Mr Agarwal challenged the claimant about this, and the potential patient safety

risks of the ward having been without a doctor. The claimant explained to Mr Agarwal that he had called Mr Q and that he refused to attend. Mr Agarwal did not accept that explanation. He spoke to Mr Q who told him at the time that the claimant had not telephoned him adding that had he done so he would have attended.

Harassment – issue 1e

10.23 Mr Agarwal explained that the above incident is why he raised this issue at the consultant's meeting on 9 December 2016 (194) a note of which records as follows, "Paramount that registrar contact the consultant should they take a patient back to theatre out of hours". In oral evidence, Mr Agarwal stated that, in addition, he had said to consultants, "if called they must attend and said to mid-grades, you must call the consultant".

10.24 The Tribunal did not find Mr Agarwal's evidence on this issue to be satisfactory. At paragraphs 43 and 44 of his witness statement he had conflated what were clearly two conversations between him and Mr Q some seven months apart. He did not make it clear that in the first of their conversations Mr Q had denied that the claimant had telephoned him (that only coming to light in the course of the investigation carried out by Mr Tulloch into the claimant's grievance in July and August 2017) or make it clear that it was only in their second conversation that Mr Q had told Mr Agarwal that the claimant had in fact telephoned him. Further, Mr Agarwal's evidence was that at the consultant's meeting on 9 December he did not mention names or criticise anyone. That, however, is contrary to, first, Mr CH having told the claimant that he had been identified at the meeting and, secondly, to the discussion between the claimant and Mr Agarwal in the corridor having been witnessed by others. Notwithstanding this change in Mr Q's account of the incident (and therefore Mr Agarwal's understanding of what had actually occurred between Mr Q and the claimant) the minutes of the meeting on 9 December were never revisited or clarified.

10.25 Mr Agarwal's evidence as recorded above was given to the Tribunal on Friday, 11 September 2020. On Monday 14 September, Mr Agarwal informed the Tribunal that he had reflected on his evidence over the weekend and felt that he had favoured Mr Q's account because of what he termed "seniority bias against the input of a middle grade".

Harassment – issue 1f

10.26 In March 2017 an issue arose in connection with underutilisation of operating theatres. The Booking Manager had sent an email to the Activity Manager (217) drawing her attention to the fact that the claimant had two theatre lists the following week that were empty except for one patient who the claimant had asked to be postponed to the following month. The consequence was that two fully-resourced

theatres would go down in one week. When this was drawn to Mr Agarwal's attention he understandably found it to be unacceptable and wrote on 29 March (216) to relevant people including the claimant including as follows:

> "1. Lists must be populated well in advance and not left with one week notice. If Manuf does not have his cases to go on the lists he be offered the right nos. of patients from pooled cases. If he finds that he is unable to do the cases this is brought to our attention (including me) so that alternative surgeons may use the list.
>
> 2. If Manuf does not have his patients to go on these lists and his lists cannot be populated by pooled cases, plans are made to offer lists to other surgeon and Manuf is given clinic/endoscopy instead."

10.27 The claimant suggests that in the above email "Mr Agarwal made unpleasant and derogatory remarks". The Tribunal does not share that view of this email; rather, Mr Agarwal was doing what was required of him as Clinical Director, he did not unnecessarily widen the circle of recipients of his email and did not make unpleasant or derogatory remarks about the claimant. In this respect the claimant specifically referred to Mr Agarwal suggesting that another surgeon use his theatre list but the Tribunal considers that to be merely an efficient use of resources in the circumstances.

Harassment – issue 1g

10.28 Later on 29 March, the above issue of the claimant not having sufficient patients to fill his operating lists developed further when the respondent's Booking Manager wrote to Mr Agarwal (copied to others including the claimant) detailing his lists in the next six weeks all of which were either empty or under-filled (218A). The following day, the Activity Manager wrote to the Booking Manager asking her to give the claimant a list of 'long waiters' from other consultant's lists to avoid his lists otherwise being empty (219). On 5 April 2017, the Booking Office then sent the claimant 16 booking cards from which he was asked to select the patients for his lists. He was asked, if he declined the surgery, to indicate the reason why on yellow stickers attached to each card; it being explained that this information had been requested by Mr Agarwal. The claimant selected only the three open hernia operations and returned the cards on the other 13 patients. This was reported back to Mr Agarwal when he was informed by the Booking Manager that the claimant still had lists that were either empty or had only one or two patients. Mr Agarwal wrote to the claimant on 5 April noting that he found this "unacceptable as your lists are under-utilised and some have no patients on them". He asked the claimant, as a matter of urgency, to plan his lists in advance and take on the pooled patients, and asked him to confirm that he had done so (220). The

claimant complains about Mr Agarwal having instructed the Booking Office to act as it did. While it is right that Mr Agarwal did give such instructions to that Office, the Tribunal is satisfied, especially in the context of his earlier email of 29 March (216), that it was reasonable for Mr Agarwal as Clinical Director to give those instructions.

Direct discrimination – issue 2k

10.29 The claimant's complaint is that on 4 May 2017 Mr Agarwal made the decision that no junior doctors were to be allocated to him such that he had no support to undertake his duties. In this regard, the Tribunal accepts the distinction drawn by Mr Agarwal and Mr Tulloch between the claimant undertaking his substantive role as an Associate Specialist and his work as a locum consultant, the latter of which is again divided between on-call work and clinical activities. In all these respects, the claimant was treated in the same way as others. Thus, Associate Specialists and doctors undertaking clinical activity do not usually have juniors assigned to them while consultants have a team comprising a middle grade and an SHO. The claimant had such a team (although it might not have been a fixed team comprising the same members) when he was undertaking on-call work as a locum consultant or doing post on-call ward rounds. In this regard in paragraph 12 of his witness statement the claimant has listed a number of surgeons with whom he compares himself: Mr Agarwal, Mr Bhaskar Mr Gopinath, Mr Shanmugam, Mr Q and Mr R all of whom he states are from India and had a full set of SHOs and registrars whereas he had no single doctor allocated to him. The Tribunal notes, however, that each of those with whom the claimant compares himself is a substantive consultant. That said, Mr G, a locum consultant surgeon who has since resigned from the respondent's employment, wrote to Mr Agarwal on 25 November 2016 stating that he needed a registrar during his on-call and post on-call and complaining that he had been struggling with that since he started his post (3349). In this regard the claimant cites Mr B as a comparator as he is a locum consultant and has a permanent mid-grade assigned to him (360). The Tribunal accepts, however, that there is a further distinguishing feature in that, unlike Mr B, the claimant was a locum consultant for only part of his job as he had retained his Associate Specialist elective work.

Direct discrimination – issue 2l; Harassment – issue 1h; Victimisation – issue 4a

10.30 As noted above, in March 2015, the claimant commenced a 12-month locum consultant position for on-call emergency surgery as cover for part of the role of Mr A. In the event, Mr A did not return from his career break and his employment with the respondent ended on 29 February 2016 (172A). As a result it was agreed that the claimant's on-call locum consultant role would continue for a further six months to allow

the respondent time to recruit a substantive consultant replacement for Mr A. This extension was then itself extended.

10.31 Following that recruitment of Mr YJ into the substantive consultant role, Mr Agarwal and Ms Dean met the claimant on 16 February 2017 to inform him that the consultant would commence his employment in July 2017 and, therefore, that the locum consultant element of the claimant's role would come to an end on 1 August 2017. Ms Dean followed this up with a letter to the claimant dated 26 April 2017 (223).

10.32 As a consequence, on 19 May 2017 Mr Agarwal and Ms Dean again met the claimant to discuss his future job plan but no agreement could be reached. The claimant saw the ending of his locum consultant role as the respondent's managers downgrading his emergency on-call duties to registrar level and him having to work under supervision, which he saw as being detrimental to maintaining and developing his skills. He did not seem to appreciate, however, that a substantive consultant had been recruited to the role previously occupied by Mr A, which the Tribunal accepts would inevitably have implications for the claimant's temporary role covering part of Mr A's role. The claimant's evidence is that throughout this meeting Mr Agarwal was shouting and insulting him including that the claimant's perception of himself as a good surgeon was contrary to Mr Agarwal's belief. According to the claimant he had also threatened him that if he did not accept the new job plan there would be no job available for him in the Directorate. Mr Agarwal did not refer to this meeting in his witness statement but, in cross examination, denied that he had conducted himself inappropriately. Ms Dean's evidence is that she did not believe that Mr Agarwal had shouted during the meeting but said that they were both very frustrated at the claimant's attitude. To an extent, the claimant's account is corroborated by the fact that he wrote a fairly contemporaneous email to Mr Agarwal and Ms Dean on 22 May 2017 (225) in which he sets out his recollection of the meeting including that he found it unacceptable for "Mr Agarwal to start shouting and projecting insults to myself by making degrading remarks that I perceive myself as a good Surgeon contrary to his belief, that was completely unnecessary". The claimant's account is also supported by the evidence from Mr Tabaqchali that the claimant had come to see him in his office, visibly upset, after the job planning meeting. His evidence was that the claimant had said, "Mr Agarwal shouted at him and humiliated him during the meeting. He was told that he had an over-inflated view of himself. He felt undervalued and he was made to feel worthless. He also felt bullied by Mr Agarwal. He informed me that he was threatened with job loss if he did not accept the proposed job plan. He was clearly worried he might lose his job and he was visibly shaken and very upset by this encounter." Additionally, in oral evidence, when the Tribunal asked Mr Tabaqchali whether the claimant had given any reason why he felt that he had been humiliated by Mr Agarwal he replied that the claimant had said, Mr Agarwal "thought that I was not as good a surgeon as I thought – I laughed".

10.33 In relation to the above points the Tribunal finds as follows. First, the Tribunal is not satisfied that the claimant was "downgraded" in the normal sense of that word. It was simply that he was told formally that his 'acting up' position as on-call locum consultant was coming to an end, which it did on 1 August 2017. As this was clearly a temporary position (308), albeit formally extended on two occasions, the Tribunal is satisfied that the respondent acted appropriately upon the appointment of the substantive consultant and that the claimant could not reasonably have expected anything else. Secondly, the Tribunal prefers the evidence of the claimant that Mr Agarwal shouted at him during the course of this meeting. The claimant is very clear of that in his evidence and while Mr Agarwal denies it, he did not address this point in his witness statement and Ms Dean only states that she did not believe that Mr Agarwal shouted, although confirming that they were both very frustrated. Furthermore, as indicated above, the claimant wrote on 22 May to both Mr Agarwal and Ms Dean and neither of them corrected his account of the meeting as he described it in that email. There is also the evidence of Mr Tabaqchali who spoke to the claimant immediately after the meeting as set out above. Thirdly, the Tribunal accepts that Mr Agarwal said at the meeting that if the claimant did not accept the revised job plan there would be no job available for him. Its reasons for this are, once more, that the claimant's evidence is corroborated by, first, the record of the meeting that is contained in the email he wrote on 22 May, which was not contradicted at the time and, secondly, by Mr Tabaqchali's evidence that shortly after the meeting the claimant come to him and informed him that he had been threatened with job loss if he did not accept the proposed job plan.

10.34 The Tribunal notes, in passing, that the reaction on the part of the respondent to Mr Agarwal's conduct at this meeting contrasts with its reaction when the claimant's conduct was reported to Dr Dwarakanath in November 2018 and, without seeking any input from the claimant, he wrote immediately warning him as to his future conduct (500).

10.35 On 14 June 2017 the claimant submitted a grievance to the Director of Human Resources ("HR") (228). In that grievance the claimant set out a range of concerns and complaints from 2011 up to and including the job planning meeting on 19 May 2017, many of which reflect those set out above. The Tribunal returns to this point below and at this stage simply notes that although setting out his grievances, the claimant does not expressly make any reference to the protected characteristic of race. He does, however, refer to harassment and in the final paragraph of his grievance states, "I am requesting investigation for this continuous bullying and harassment, prejudiced and unfair treatment and the motives behind it" (234).

10.36 The claimant's grievance was considered at a first investigation meeting held on 4 July 2017 with Mr Tulloch as Investigating Officer (241). At that meeting the claimant was given the opportunity to

expand upon his written grievance, which Mr Tulloch undertook to look into. Adverting to the above point that the claimant did not refer to the protected characteristic of race in his written grievance, the Tribunal notes that this fairly lengthy investigation meeting was the opportunity for him to fix his assertion of harassment and prejudice (to which he referred in the final paragraph of his written grievance above) to that protected characteristic but he did not specifically do so except that at the end of the notes of the meeting the claimant is recorded as having stated with regard to Mr Agarwal "that he knew what he does to defend people"(247).

10.37 That said, as is set out more fully below, at the second investigation meeting on 4 August 2017 the claimant is clear in making express reference to issues of ethnicity and race (265).

Harassment – issue 1i

10.38 The Directorate holds regular monthly Morbidity and Mortality ("M&M") meetings. These meetings were succinctly described by Mr Tabaqchali. His evidence is that they are mandated by the Royal College of Surgeons and form an essential part of continuing medical education for all concerned, and provide an opportunity to learn lessons from clinical outcomes and drive improvements in service delivery. Such a meeting took place on 28 July 2017. It is the claimant's evidence that as he was making a presentation of one of his patients who had post-operative complications from which he made a full recovery he had been interrupted by Mr Agarwal who had made humiliating, degrading and offensive remarks in front of junior and senior doctors and administrative staff. These remarks included that the claimant needed to use common sense, had not looked after his patient, there was a competency issue, patient safety had been compromised, he had serious doubts about the way the claimant handled things in general and the anaesthetist in charge was very much concerned about the large quantity of bile that had leaked during operation. Mr Agarwal's evidence was that at the M&M meeting they had discussed what to do when a significant bile leak is encountered during the operation but that the claimant "did not take on board this constructive criticism and felt it to be a personal attack which it certainly was not". That evidence is not consistent with that of Mr Tabaqchali who confirmed that the claimant was interrupted repeatedly and his actions were strongly criticised by Mr Agarwal who, on several occasions stood up and "was very animated, sometimes shouting in an intimidating manner". At one point he had told the claimant "that he did not care about his patient and that his performance was substandard". Mr Tabaqchali said that he had been surprised by Mr Agarwal's conduct and the way in which he confronted the claimant and he therefore asked for all interruptions to be stopped. Mr Tabaqchali continued that Mr Agarwal had then added that the anaesthetist who did the case had informed him about a bile leak and said that he only wanted the claimant to have common

sense. Mr Tabaqchali's evidence is supported to an extent by an email to the claimant from the particular anaesthetist dated 3 August 2017 in which he states, "I can confirm that I did not raised any formal or informal patient safety issues regarding the cholecystectomy case with biliary leak that I anaesthetised for you" (259). That email obviously contradicts Mr Agarwal's comment that the anaesthetist had informed him about a bile leak. It is also a factor that fairly soon after the M&M meeting the claimant wrote an email to the Director of HR on 2 August 2017 in which he summarised the above concerns (258). In light of the above corroborative evidence from persons not directly involved in the allegation and counter-allegation (Mr Tabaqchali and the anaesthetist) and the claimant's email of 2 August, the Tribunal prefers the evidence of the claimant in this respect: specifically, at the M&M meeting Mr Agarwal, first, did accuse the claimant of having no common sense and, secondly, made unfounded allegations against him that the anaesthetist was very much concerned about the large quantity of bile leak.

10.39 In that the evidence of Mr Tabaqchali features in the above paragraph it is opportune to make a general observation at this point that the Tribunal was struck by a comment that he made during cross examination that his assessment of the Directorate was that there was "A culture within a culture – a group within a group the members of which got better support, better juniors and better pay". He was asked whether the group to which he had referred were all Indian and he confirmed that they were.

10.40 The claimant concluded is email of 2 August to the Director of HR by remarking that it was "unacceptable to be victimised by Mr Agarwal just because I had submitted my Grievances with him to HR." In that regard the Tribunal notes from Ms Dean's email of 27 July 2017 (256) that it does appear that Mr Agarwal was aware of the claimant having raised a grievance against him prior to the M&M meeting.

10.41 The second investigation meeting into the claimant's grievance took place on 4 August 2017 (260). While this is the second meeting that had been arranged to discuss the grievance it has additional significance in that at this meeting the claimant presented to Mr Tulloch details of 25 patients whom he alleged had "suffered complications, negligence, delayed treatment and avoidable deaths." In this respect the Tribunal records that the respondent accepted that the claimant raising these concerns amounted to a protected disclosure. Additionally, at this meeting, unlike the first investigation meeting, the claimant made express reference to issues of ethnicity and race. Having named five surgeons whom he described as being "untouchable" the claimant is recorded as having said, "it was dependent upon nationality if you are white or from India you would receive different treatment". In this regard, the claimant referred to a Turkish surgeon who had received treatment similar to him, a doctor from Pakistan "who had put a complaint in about how AA had treated

her" and a colleague from Nigeria who was "shouted at by one of AA close friends" (265).

10.42 The 25 patients referred to above were reviewed by Mr Tulloch. He noted that all but one of the cases had been through at least one of the relevant processes operated by the respondent: the M&M meeting, the Independent Review Panel ("IRP") or the Safety Panel. The one case that had not been through a review route was relatively recent and there were plans in place to progress it. Having reviewed the documentation, Mr Tulloch was satisfied that the appropriate processes had been adopted to ensure that objective scrutiny had been applied and he had not identified any untoward practice occurring within the Directorate (285/6).

10.43 Mr Tulloch's letter addressing the several aspects of the claimant's grievance and informing him of the outcome is dated 19 October 2017 (284). In the main, Mr Tulloch did not uphold the claimant's grievance. He did, however, note that there were some elements where he believed there was "additional work required by the directorate to address issues". Such elements were as follows:

10.43.1 An action would be provided to the Directorate to address surgeons who did not regularly attend morning emergency meetings, despite that being an element within their job plan, which Mr Tulloch considered to be essential in preparation for the day ahead and ensuring patient safety (287).

10.43.2 An action would be suggested for the Directorate to address the matter of private work within the job plan meetings going forward (288).

10.43.3 As to the question of whether or not the claimant had contacted Mr Q for assistance (referred to above) it was reasonable to believe that as the claimant had contacted Mr Q, "it would have been clear that you required support from him so as to allow the F1 to remain on the ward. The investigation team will request that this issue is addressed separately by the directorate" (289).

10.44 Additionally, Mr Tulloch made a number of recommendations for implementation on the part of the claimant as follows:

10.44.1 "Increase your visibility at Directorate meetings.

10.44.2 Provide statements when requested by the directorate to support with the investigation of incidents. All statements should be submitted within the required timeframes.

10.44.3 Use the Trust Datix system to report incidents" (289).

10.45 The Tribunal considers the third of the above points to be significant given the later incidents (referred to below) when consultant surgeons by-passed the Datix system to report their concerns about the claimant directly to Ms Dean.

10.46 Additionally at this time Mr Tulloch wrote to Ms Dean and Dr Dwarakanath (copied to the Director of HR) on 16 August 2017 (269) suggesting "The way forward" in respect of the matter of the claimant's job plan. Mr Tulloch wrote, "He will cease, at least until resolution is reached, middle grade on call during the day" …. "A job plan meeting will take place ASAP probably with [*Dr R*] as a senior clinician". Mr Tulloch observed "We cannot have a new consultant starting with the potential for MK [*the claimant*] undermining him early in his consultant career." The Tribunal considers this to be a strange email in the circumstances. Mr Tulloch's function was to consider the claimant's grievance yet he intervened in relation to the job plan process and did so in a negative fashion marking out the claimant as being potentially disruptive in relation to the arrival of the new consultant when there was no evidence at that time upon which to base that judgment other than the claimant having raised his grievance and, in the course of that, the 25 patient safety issues while, both of which he was perfectly entitled to do without such a negative reaction on the part of Mr Tulloch.

Direct discrimination – issue 2m; Victimisation – issue 4a

10.47 As Mr Tulloch had directed in his above email, a job plan mediation meeting took place shortly thereafter on 1 September 2017 and, as he had suggested, it was with Dr R and Ms Dean; this in the wake of the unproductive job plan meetings that the claimant had previously had with Ms Dean and Mr Agarwal on 16 February and 19 May 2017 (referred to above). To recapitulate, the context for those job plan meetings was the coming to an end of the claimant's locum consultant post on 1 August 2017 following the appointment of the substantive consultant, Mr YJ, in July 2017 and, therefore, the need for the claimant to revert to his substantive position as Associate Specialist.

10.48 On 27 September 2017, Ms Dean wrote to the claimant to inform him of the outcome of the mediation meeting (279). Amongst other things she recorded that at the meeting, the claimant had "requested that you should carry out your duties as Associate Specialist but on the 4th tier (Consultant tier) of the rota and proposed that we replaced a current consultant on the rota over the emergency surgical scheduling cycle". Ms Dean informed the claimant that the Directorate had considered this request but concluded that it was not able to support the claimant's request to participate on the 4th tier of the emergency surgical rota. The Tribunal accepts the respondent's response to the claimant's request in light of the following reasons, which were given by Ms Dean:

10.48.1 The strategic direction of the Directorate was to have consultants who were on the specialist register delivering the emergency surgical service and it had a programme of recruitment to deliver this goal.

10.48.2 All substantive positions advertised over the last two years had included the emergency surgical on-call rota element and the Directorate had been successful in recruiting consultants with the requisite qualifications.

10.48.3 The removal of a consultant from the emergency rota would require organisational change and additional infrastructure costs for which there was no service requirement and no patient benefits.

10.48.4 The claimant's substantive position included provision for him to carry out emergency surgery on the 3rd tier of the rota and that position would need to be backfilled if the claimant did not carry out those duties. The 3rd tier was already under pressure with two vacancies from October 2017 and the claimant's removal would result in a third vacancy and an additional cost pressure for the respondent. There was a risk that the Deanery Registrar training could also be adversely affected.

10.49 The claimant construed the above as a decision by Mr Agarwal at this time to reject the request that he had initially made at the job plan meeting on 19 May 2017 to work without supervision.

10.50 By email of 29 September, the claimant agreed to revert to his former job plan albeit "under protest and until the appeal process concluded" (282). In this email the claimant also raised a point that is relevant to his complaint to this Tribunal that he was underpaid the salary due to him. He stated that he had been informed that appraisers, "are entitled to 0.25 session per annum for doing appraisals and this is a trust policy. I joined the appraiser team in the Trust in 2012, could you please backdate this payment. Bearing in mind I do large numbers of appraisals."

10.51 As indicated above, Ms Dean had informed the claimant that the Directorate was unable to support the claimant's request to participate on the 4th tier of the emergency surgical rota. By letter of 24 October 2017 (296), the claimant appealed against Mr Tulloch's decision in respect of his grievance. His grounds of appeal revisited many of the above points and included that Mr Agarwal, "always protect his close friends and treat them favourably" and "provide protection to some of his close friends and myself less favourably. This is contrary to the law and to the GMC code of practice."

10.52 The appeal meeting took place on 29 January 2018 (348). It was conducted by Ms Thompson. Prior to the meeting the claimant wrote to her on 9 January 2018 (341) to the effect that Mr CH was happy to give evidence in respect of Mr Agarwal having behaved inappropriately towards the claimant regarding the incident on 8 December 2016 when Mr Q had refused to attend the hospital and Mr Tabaqchali was happy to provide information regarding Mr Agarwal's conduct towards the claimant at the M&M meeting. The claimant asked Ms Thompson to request explanations from them. Ms Thompson replied the following day that her role was limited to

hearing “the appeal and not rehearing the case”. She suggested that it would only be appropriate for Mr CH and Mr Tabaqchali to attend as witnesses, “if they were involved in the initial grievance process as new information is not able to be considered during the appeals process” (340).

10.53 The Tribunal can find no such limitation on the role of the appeal manager within the respondent’s Grievance Policy and Procedure (1730) and this Tribunal has not previously had experience of such a limited approach either within the tribunal jurisdiction or outside it; the non-legal members having particular and extensive experience in this regard. Indeed, the respondent’s grievance procedure at paragraph 3.3 (1742) refers to both the employee and the management side calling “any witnesses”, which would appear to be wide enough to encompass the likes of Mr CH and Mr Tabaqchali whom, it seems, could provide potentially valuable information to the appeal. In his reply to Ms Thompson of 10 January 2018 (340) the claimant explained why these doctors would be relevant witnesses but to no avail as Ms Thompson did not reply.

10.54 At the grievance appeal meeting on 29 January Ms Thompson began to work through each of the 10 points in the claimant’s grievance appeal letter but adjourned that afternoon for want of time.

10.55 On 2 February 2018 the claimant wrote again to Ms Thompson (355) to explain once more how Mr CH and Mr Tabaqchali could provide relevant evidence and asking if she could request statements from them as both were “happy to respond if the request comes from yourself”. He explained that “the dynamics in the directorate are very sensitive and they don’t want to be seen taking side, hence they are happy to respond when the request is official. This is very important in the coming meeting”. Again Ms Thompson did not reply.

10.56 Although departing from the chronology, it is convenient and appropriate that the Tribunal should continue with its consideration of the grievance appeal.

10.57 The reconvened grievance appeal meeting did not take place until 6 August 2018. Although the Tribunal understands the pressures on the time of the individuals involved (which was referred to by Ms Thompson in evidence) it considers this to be an inordinate delay of over six months, which is contrary to the ACAS Code of Practice: Disciplinary and Grievance Procedures (2015) that grievance meetings should be held without unreasonable delay. In this connection the Tribunal also notes that in its decision in WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 the Employment Appeal Tribunal held that there is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have.

10.58 In connection with fixing the date for the reconvened grievance appeal meeting the claimant had provided dates of his availability. On 25 July 2018, Ms M wrote to the claimant inviting him to the reconvened appeal hearing on 6 August 2018 (392). That was not a date which the claimant had said was suitable for him. He therefore replied to the effect that he had a theatre list that day, he was busy on-call the week before and it was very short notice and he needed time to prepare (392). Ms M replied noting that the respondent was aware that the claimant had clinical commitments but that the Directorate would make arrangements to cover so as to enable him to attend; and seven working days' notice was felt appropriate and not outwith the respondent's policy.

10.59 In this connection Ms Johnson then wrote to the claimant on 29 July 2018. She advised him that she and Ms Thompson would like to hear the remainder of the appeal and would prefer the claimant to be present but should he choose not to attend he could present any further information in writing or, alternatively, they would consider the remainder of his previous statement of case (390). The claimant replied that afternoon stating that for the reasons contained in that email he believed, "the only fair hearing is to consider all the evidence in my presence". Ms Thompson joined in the correspondence on 1 August 2018 (394) when she wrote to the claimant repeating what Ms Johnson had written to him in her email of 29 July. The claimant replied that his statement was just headlines of incidents and issues and the documented evidence was huge and required explanation by him especially as some of the issues had already been misunderstood in previous meetings. He concluded, "any meeting without my presence will be meaningless and any outcome will be to my prejudice" (394). Nevertheless, the meeting went ahead in the claimant's absence (398A).

10.60 As indicated above, the claimant had written to Ms Thompson regarding the potentially valuable evidence that Mr CH and Mr Tabaqchali could provide to her at the appeal meeting. He both wrote on 9 and 10 January before the first meeting and, after that meeting, on 2 February 2018. Shortly before the adjourned meeting on 6 August the claimant wrote again to Ms Johnson on 29 July amongst other things making her aware that Mr CH and Mr Tabaqchali had witnessed separate incidents and were happy to provide their input if they received an invitation from either her or Ms Thompson; in a subsequent email that day he attached a copy of his email of 2 February 2018 to Ms Thompson and stated that he had not received any response (393). Once more, the claimant did not receive a response to his request.

10.61 The Tribunal considers that it was remiss of Ms Thompson to refuse to receive information from Mr CH and Mr Tabaqchali at the adjourned appeal hearing. The only point outstanding when the first appeal meeting was adjourned was point 10 in the claimant's appeal letter,

which stated as follows: “It is very clear from the evidence I have submitted that Mr Agarwal provide protection to some of his close friends and treated myself less favourably. This is contrary to the law and to the GMC code of practice” (297). That expressly relates to the issue of less favourable treatment and it appears that the two surgeons could potentially have given pertinent evidence in that regard yet Ms Thompson refused to invite them to do so. The Tribunal also considers that it was remiss of Ms Thompson not even to reply to the three letters from the claimant referred to above.

10.62 The claimant was notified of the grievance appeal outcome by letter of 21 August 2018 (414). In that letter Ms Thompson worked through the claimant’s 10 grounds of appeal as set out in his appeal letter of 24 October 2017 (296); albeit ground 10 had become ground 11, a new ground 10 having been inserted relating to the claimant not being able to attend consultant-only meetings despite his extensive clinical experience. As had Mr Tulloch, she did not uphold the majority of the points that the claimant had raised but, again like Mr Tulloch, noted, “whilst points 5 and 8 were raised within the appeal points, the investigation had substantiated the concerns raised and therefore appropriate recommendations for action were made”.

10.63 Returning to the chronological order of events, as mentioned above at the second grievance investigation meeting with Mr Tulloch the claimant had raised concerns in respect of 25 patients. Dr Dwarakanath was made aware of this by Mr Sheppard and Ms Johnson in early February whereupon he established a panel to consider the concerns the claimant had raised in relation to these patients. The individuals whom Dr Dwarakanath invited to join him on the panel were Mr C, consultant urologist and medical director with a neighbouring NHS Foundation Trust and Mrs C (no relation to Mr C) who was employed by the respondent and had expertise in governance and safety. The evidence of Dr Dwarakanath was that Mr Agarwal and a colleague provided access to the patients’ records and other relevant information but neither “played any role in the review” but that is contrary to the letter he wrote to consultant surgeons and urologists dated 25 June 2018 in which he stated that the cases “were critically reviewed by [*Mr C*], myself, Mr Agarwal and [*Mrs C*]” (381); that clearly indicating Mr Agarwal’s position within the review panel.

10.64 As part of the investigation panel process, Mr Agarwal produced further information in respect of the 25 patients. He could address the majority himself given his area of work and specialty but he considered that he needed the input of other surgeons in relation to other areas such as the Breast Team.

10.65 At the conclusion of a consultants’ meeting in April 2018 Mr Agarwal asked a number of them (approximately six) to remain behind. He told them of the concerns that had been raised and asked them to produce reports regarding their respective patients. The oral evidence of the

respondent's witnesses in relation to this meeting was to suggest that the claimant was not named by Mr Agarwal as being the person who had raised the concerns but that is contradictory to the evidence in Mr Bhaskar's witness statement that at this meeting in April he was given details of two cases pertaining to his treatment, "In one of the cases discussed it states that Mr Kassem had been told by another consultant that I had performed an experimental operation on a patient ….. This incident occurred in 2012 so there had been plenty of time for Dr Kassem to have approached me to express his concerns." That witness statement was presumably produced in a considered way and with the benefit of legal advice and the opportunity for discussions with colleagues, for example Mr Agarwal. That being so, the Tribunal accepts that evidence that at the meeting in April the identity of the claimant as the individual who had raised the patient safety concerns was revealed by Mr Agarwal. That is consistent with the evidence in Mr Agarwal's witness statement that he "was informed by Dr Dwarakanath in or around February 2018, that he had set up a panel to review 25 patient cases where concerns had been raised by Dr Kassem."

10.66 In May 2018 the panel produced its report into its consideration of the 25 patients (366). Although some future learning points were highlighted the panel concluded that "there were no failings in the care of these patients" and that initial reviews of the cases had been undertaken in accordance with the respondent's governance processes.

10.67 Also in May 2018, Dr Dwarakanath decided to meet the consultants in the Directorate. That meeting took place on 11 May 2018 the purpose of which was said to be to reassure them in light of their knowledge that concerns had been raised and were being reviewed by an independent panel. Again an issue arose in evidence as to whether Dr Dwarakanath had named the claimant. In this regard the oral evidence of the relevant witnesses for the respondent was that the claimant was not expressly named but everyone knew that it was him who had raised the concerns because he had been observed taking detailed notes at the M&M meetings, checking patient records and speaking to relevant secretaries. The evidence in the witness statement of Mr Shanmugam is clear, however, "At this meeting we were informed by Deepak Dwarakanath (Medical Director) that Dr Kassem had raised concerns about 25 patients, two of whom were mine ….. This was when I first became aware of the allegations made against me and my colleagues by Dr Kassem." In contrast, the evidence in Mr Agarwal's witness statement is, "My recollection is that there was no mention of Dr Kassem or any other person's name as having raised these concerns." In this connection, the evidence in Mr Bhaskar's witness statement is that at the initial meeting in April Mr Agarwal had said that "there had been cases put forward against us by Dr Kassem (inferred names were not mentioned)" and, in respect of the May meeting, "I cannot recall whether Dr Kassem was

mentioned by name, but it was obvious to me that the concerns had been raised by him". The Tribunal considers this evidence of Mr Bhaskar to be unsatisfactory not least because it is clear, as mentioned above, that by the time of the May meeting he was already aware that, first, there had been concerns raised about him and, secondly, that it was the claimant who had raised those concerns; and in connection with this he felt betrayed by the liaison between Mr H and the claimant about this, which had put immense pressure upon him. Finally in this respect, Dr Dwarakanath only states in his witness statement that during the course of the meeting, "I do not recall stating Mr Kassem's name". Considering all the above evidence in the round, the Tribunal is satisfied that the claimant was identified both at the April meeting and at the May meeting; indeed, it was a finding of the investigation into the claimant's second grievance (see below) that the claimant was identified at the May meeting.

10.68 Dr Dwarakanath then invited the claimant to meet with him and Ms Johnson on 31 May 2018 so as to provide feedback on the review of the cases.

10.69 Dr Dwarakanath followed up the meeting with consultants on 11 May by writing to the consultant surgeons and urologists on 25 June 2018 (381). In that letter he confirmed that the cases raised "by Mr Kassem" had been critically reviewed, learning had occurred, the matter was closed and they had "fed back to Mr Kassem".

10.70 Of relevance to the above matters is that the claimant wrote to Ms Lynch on 10 May 2019 (980) submitting concerns that were taken forward as a second grievance, which was considered by Mr P. The Tribunal returns to this in its proper chronological order below. The point of relevance in respect of the above, however, is that in Mr P's outcome letter of 13 February 2020 (1154) he summarised the second element of the claimant's concern as being that Dr Dwarakanath "had informed your surgical colleagues that you were involved in a whistleblowing process". In that outcome letter Mr P records that the purpose of the meeting on 11 May 2018 "was to discuss the concerns raised, and you were identified in this meeting as the person who had raised them". Mr P also confirmed that the claimant was cited in Dr Dwarakanath's letter of 25 June 2018 referred to above. Mr P records Dr Dwarakanath's explanation that he had not needed to name the claimant as he believed that his colleagues were in no doubt as to who had whistleblown but, that notwithstanding, Mr P was satisfied that there was evidence to substantiate the claimant's allegation that a breach of confidentiality had occurred; and that was in breach of the respondent's "Raising Concerns (Whistle Blowing) Policy (1750). As such, this element of the claimant's grievance was upheld.

10.71 In this connection the Tribunal notes that in oral evidence, Dr Dwarakanath stated that he did not accept that finding of the Grievance investigation but it would appear that he did not dispute it

at the time. Dr Dwarakanath's unwillingness to accept this finding of the Grievance investigation is perhaps unfortunate given that he, as one of the respondent's Directors, is required by that Whistle Blowing Policy to ensure that it is applied within his area of responsibility (1754).

Harassment – issue 1j; Whistleblowing – issue 8a

10.72 On 4 June 2018, Mr Shanmugam sent an email to Mr Agarwal, copied to Dr Dwarakanath, with the subject, "Mr Kaseem" the purpose of which was to inform Mr Agarwal of an argument that he had had with the claimant that morning (379A). The context was that the claimant had contacted him the previous night in relation to a very sick patient. They had agreed that the patient should be taken to surgery and that the claimant should liaise with the urologist at James Cook Hospital. In the event, in discussion with that urologist, the anaesthetist and palliative care, the claimant had decided not to operate on the patient. Mr Shanmugam's complaint was that the claimant should have informed him of this change so as to give him the opportunity to become involved. That said, he did not disagree with the claimant's clinical decision. The claimant's position was that the situation had moved on following his discussion with Mr Shanmugam and the decisions were taken and agreed within the multi-disciplinary team involved in the patient's care. In the email to Mr Agarwal, Mr Shanmugam did not require any action on the part of either him or Dr Dwarakanath; the email was merely to convey information about the claimant.

10.73 Mr Shanmugam followed up that email by submitting a Datix on 6 June, reference w95087 (454). In that Datix Mr Shanmugam briefly described the incident as above but continued, "When the middle grade was challenged about this he started intense argument and give various explanations. He should have informed the consultant when the decision was changed. Consultant feels it is not safe to do any more on calls with this particular middle grade because his action was not reliable and instead of feeling sorry for his action he was trying to justify his action." (455) It is clear from the investigation meeting interview with the Emergency Nurse Practitioner who was present at the time (791) that there was a difficult and argumentative discussion between Mr Shanmugam and the claimant who was challenging to his senior consultant. The Datix also refers by name to the claimant under each of the sections headed "Contacts" and "Employees" (457). Although a relatively small point, it is interesting that Mr Shanmugam thus named the claimant while Mr Agarwal took great exception when he was named by the claimant in a subsequent Datix submitted by the claimant in respect of Mr Agarwal; so much so that he had his name removed. Indeed, it was apparent from Mr Agarwal's evidence to the tribunal that he was of the view that individuals should not be named in a Datix. In this respect, the Tribunal notes that a Datix has a wide circulation (see, for example, 387 and 379B). Further, the initial input

into this Datix from Ms A, the Clinical Governance Manager, seems to query the use of the Datix process for these purposes in that she observed that she was "not sure the content in this DATIX is appropriate for all to see as it's more of a management/HR issue. Totally agree that the delay in debridement should be on and looked at though. Stephen will reject it if you advise." Ultimately, on 12 October 2018 feedback from Dr Dwarakanath is recorded on the Datix as being that "there has been a HR investigation and the person is no longer on the on-call rota. Incident closed." (456) The Tribunal received no evidence that the claimant was ever contacted by Patient Safety in respect of this incident or, indeed, that Patient Safety investigated it at all. The fact that there was no investigation appears to be borne out by the claimant's surprise when he discovered that the Datixes submitted by Mr Shanmugam and Mr Bhaskar were referred to in his safety certificate for his appraisal on 23 October 2018, which Patient Safety confirmed had been an administration error (433). The Tribunal returns to this point below.

10.74 The Tribunal further notes that Mr Shanmugam's suggested action that it was not safe for him to do any more on calls with the claimant was not taken forward and they were subsequently placed on the on-call rota together. This caused Mr Shanmugam to write an email to Ms Dean and Mr Agarwal on 9 August 2019 under the subject heading "kaseem" (842) asking that the claimant be released from his on-call duties with Mr Shanmugam. The Tribunal also returns to this point below.

10.75 Some time previously, an incident had occurred on 27 December 2017 involving a doctor in training and what appeared to have been a lack of support from the claimant leaving the doctor to make decisions beyond his capacity. This gave rise to an Exception Report being submitted on 2 January 2018 and a review meeting being conducted by Mr Bhaskar, the doctor's clinical supervisor, on 8 January 2018 (318A). The resultant decisions were: the doctor should receive time in lieu for hours that he had overstayed; it would be checked with the Directorate whether there was sufficient help on the floor on the day; advice would be given to the claimant's line manager that he should provide sufficient help for juniors both for educational value and for patient safety reasons. That appears to have been sufficient to conclude this matter. Mr Bhaskar mentioned the final point to the claimant at his appraisal on 1 February 2018, however, when the claimant responded that it was, in fact, the doctor who was inattentive and unreliable. Mr Bhaskar therefore met the doctor again in March and he explained that he had been on the 'phone to his wife in Sri Lanka in respect of a family matter. Mr Bhaskar's evidence is that, ordinarily he would have then gone back to the claimant and discussed matters with him further but by this time he "strongly suspected" that the claimant had raised clinical concerns about his practice and all communications with the claimant had ceased. Mr Bhaskar's evidence is that it was for this reason that he felt he had no

choice but to report the concern through the Datix in June 2018. The Tribunal notes, however, that by this point Mr Bhaskar did not "strongly suspect" the claimant; rather, he knew from the consultants' meetings in April and May that the claimant had raised concerns about his clinical practice.

10.76 Be that as it may, on 6 June 2018 (the same day as Mr Shanmugam submitted a Datix) Mr Bhaskar also submitted a Datix, reference w95107 (805/812A). Before doing so he discussed matters with Mr Agarwal and he agreed that the concern should be submitted in a Datix. Mr Bhaskar explained that the delay in submitting this Datix relating to an incident on 27 December 2017 until 6 June 2018 was the result of a combination of reasons: being on-call, attending recruitment interviews in London and being absent from work due to sickness. Even accepting his explanation that he wished to speak again to the doctor, he did that in March 2018 and the Tribunal is not satisfied that there was no opportunity between then and 6 June 2018 for him to raise his concern. Furthermore, the Datix policy (1558) provides at section 4.11 that all staff are "responsible for reporting incidents as soon as possible, ideally within 12 hours" (1565).

10.77 The Description on that Datix submitted by Mr Bhaskar records the incident and the action taken in light of the Exception Report both as summarised above. The doctor involved is named within the Contacts section and the claimant is named in the Employees section. The Suggested Actions from Mr Bhaskar are that statements are needed from the doctors concerned, to ensure that the claimant is contactable at all times when expected to be on duty in the hospital and junior doctors should be supported by middle grade doctors at all times making decisions on emergency patients (812). The Tribunal fails to understand why such actions involving statements from the doctors involved was necessary on 6 June 2018 when the matter had been appropriately dealt at the Exception Report Review on 8 January 2018.

10.78 In an observation similar to that she had made in respect of Mr Shanmugam's Datix, the Clinical Governance Manager once more seemed to query the use of the Datix process for these purposes when she observed, "this is more a management issue, although there were clinical implications" (812G).

10.79 These two observations that the Clinical Governance Manager made regarding the Datixes submitted by Mr Shanmugam and Mr Bhaskar respectively caused the Tribunal to be concerned that these Datixes were not being used for the intended purpose of highlighting patient safety concerns and serious incidents within what has been described as a 'no blame' culture so as to enhance learning within the respondent.

10.80 As intimated above, on 9 August 2018 Mr Shanmugam wrote to Ms Dean (842), sending a copy to Mr Agarwal, under the subject, "kaseem", stating as follows:

> *"I notice I am doing on call with Mr Kaseem on 24, 25 and 26th August. Due to following reasons I do not think it is safe to work with him.*
> 1. *During on-call with me he does not behave as a member of my team. He makes his own decisions about critically ill patients and he does not inform me.*
> 2. *He does not behave in a professional manner especially when I question him about his decisions, he starts heated arguments with me.*
> 3. *Most of the time his behaviour and body language is very threatening to me.*
>
> *Please make arrangements to release him from the on call on these dates."*

10.81 It is apparent that Mr Shanmugam having submitted the Datix on 6 June, neither he nor the claimant received any feedback or outcome and it would therefore appear that there had not been any investigation. It is reasonable to assume that it was these circumstances that caused Mr Shanmugam to escalate matters and write directly to Ms Dean as set out above. They then spoke and agreed that the claimant could continue to carry out his emergency duties. Ms Dean replied to Mr Shanmugam to that effect adding, "if there are any displays of unprofessional behaviour or conduct you would escalate immediately" (842); she sent a copy of that email to HR. It follows that Mr Shanmugam and the claimant then did work together on the three shifts referred to in his email, apparently without incident.

10.82 On 18 September 2018, Mr Bhaskar wrote to Mr Agarwal (copy to Ms Dean) stating, "Continuing to do on call when Mr Kaseem is on call as a middle grade is continuing to be stressful and difficult for me" (853). He gave the following two examples. First, on August bank holiday Monday (27 August 2018) Mr Bhaskar was covering both first and second on call. The claimant had handed over a patient (a teenage boy with testicular torsion) to Mr Shanmugam without communicating with Mr Bhaskar. Secondly, on 3 September 2018 Mr Bhaskar had prepared to undertake surgery on a patient who had then arrived in theatre in an unstable state and "the absence of communication with Mr Kaseem" had made him have to change his plans "unnecessarily causing confusion to the theatre staff and possible safety of the patient". Mr Bhaskar explained in his witness statement that while he would have been able to have an informal discussion with the claimant in the past, he had to write to Mr Agarwal and follow the official route of raising concerns, "Due to the absence of communication in any form and the fear of persecution of contacting Mr Kassem directly".

10.83 As to the first of the two examples given by Mr Bhaskar, the Tribunal accepts the claimant's evidence, supported as it is by the record of the Emergency Surgical Morning Meeting (408A), that he could not hand over to Mr Bhaskar (or his registrar on the second on call team) because neither was in attendance at that meeting. A further issue arose during oral evidence when it was suggested that the claimant had unnecessarily delayed the required surgery. Again, the Tribunal accepts the claimant's evidence as to timings in relation to this issue including that he was only able to obtain the consent of the child's father at "7:35AM" (858) and booked the patient for theatre at "7.40am", classifying the category of intervention as "Immediate" and noting a preferred start time of "ASAP" (855). In this regard, the Investigation Team recorded that it was "concerning there was not an immediate and clear strategy to get the child straight to theatre at this point, booked with teams at the ready, whilst the search for the father took place and consent completed" (650).

10.84 As to the second example, even with the benefit of the explanations Mr Bhaskar gave in oral evidence, the Tribunal fails to understand why he thought it necessary to criticise the claimant. On the evidence available to the Tribunal, the claimant appears to have acted appropriately in communicating with his consultant on-call, Mr YJ, and the other relevant individuals and departments, and he had sought to communicate with Mr Bhaskar and had communicated with Mr Bhaskar's registrar, Ms GB, who had been excited about the uncommon diagnosis. Further, he had asked Mr YJ to telephone Mr Bhaskar directly, which he had done. Indeed Mr YJ confirmed to the Investigation Panel when this incident was considered that he "went to theatre and saw PB [*Mr Bhaskar*] and YJ relayed the information regarding the patient to PB". In this regard, the Tribunal notes the observation by the Investigating Officer at the investigation meeting that she held with Mr Bhaskar on 5 October 2018 when she, "queried if this was not a failure of [*YJ*] as the Consultant who was assessing and seeing the patient", in respect of which Mr Bhaskar stated that it was, ultimately, as the patient was under YJ. The Tribunal understands and shares that query.

10.85 The Tribunal also notes that when this particular issue was raised at the M&M meeting on 26 October 2018 (2214), where YJ did the presentation, no issues were raised by any consultants, doctors or the patient safety team.

10.86 Mr Bhaskar concluded his email of 18 September 2018 by stating, "I hope the situation will be appropriately dealt with and I will be able to proceed with my on calls without any stress. I am starting my next on call on 12th October 2018." The Tribunal notes that, in essence, this request is the same as that made by Mr Shanmugam and arises from the fact that these two consultants were unwilling to have the claimant work on call with them.

10.87 As mentioned above, the Datixes submitted by Mr Shanmugam and Mr Bhaskar appeared in the claimant's safety certificate for his appraisal on 23 October 2018. This surprised him as he had not received any formal request for a statement to explain his side of things. He therefore wrote to this effect to Patient Safety on 17 October 2018 (434) and expressed his disappointment that the process appeared to have been used for other purposes. Patient Safety replied that none of the incidents were classified as either SIs or IRPs and should not have been included; there had been "an administration error" (433).

10.88 In light of our findings set out above, the Tribunal finds that the four matters considered above (Mr Shanmugam's Datix, Mr Bhaskar's Datix, Mr Shanmugam's email and Mr Bhaskar's email) were all raised/written with the express purpose of removing the claimant from the emergency on-call rota.

Harassment – issue 1k; Whistleblowing – issue 8b

10.89 As mentioned above, the claimant's first grievance concluded with the outcome letter of 21 August 2018 (414). It appears that Ms Dean had expected that outcome to address also the job plan process and, with it, the claimant being removed from the on-call emergency rota at locum consultant level (tier 4). Thus, that issue would have been concluded. This is apparent from her email to Ms M of 31 August 2018 (413) to which she attached a draft letter to the claimant that it seems she intended to send to him, "following the appeal grievance/job plan letter have been sent to him." In her reply of 4 September 2018, however, Ms M advised that an appeal meeting in respect of the job plan would be required (413). This caused Ms Dean to write that day, "This is really disappointing and concerning as he is due to commence next round of emergency surgery in October" (412). Ten minutes later, Mr Agarwal responded, "In that case we will need to inform him of not doing on calls from October, the formal job planning will have to wait till after appeal meeting. Helen please give your availability to meet with MK, think we have a 1pm on 14th September in our diaries". Five minutes after that, Dr Dwarakanath added, "Agree we need to stop the on calls and get on with the job planning" (412). This intervention of Dr Dwarakanath is contrary to the evidence in his witness statement, where, having noted the claimant's claim that in September 2018, he was involved in a decision between Mr Agarwal, Ms Dean and Prof M to remove him from emergency on-call duties he states, "I was not involved in any discussions relating to this decision". Given this exchange of emails (412), the Tribunal does not accept this evidence of Dr Dwarakanath that he had no involvement in this matter.

10.90 In cross examination, Mr Agarwal and Dr Dwarakanath both agreed that their intention was to ensure that the claimant being on the on-call emergency rota in any capacity (i.e. as locum consultant or in his substantive role of Associate Specialist) was stopped.

10.91 On 6 September 2018, Mr YJ was unable to contact the claimant either on the department's DECT telephone or on the mobile phone issued to the claimant by the respondent. He had attempted to contact the claimant on three occasions between approximately 09:14 and 11:02 (844). The claimant's evidence was that he was in theatre that morning, which appears to be borne out by the record of the Access History of his pass card (935). Further, he explained that everyone entering theatre must leave their mobile phones and pagers at reception outside. It can be seen from the claimant's telephone records (846) that the claimant accessed his voicemail at approximately 11:23 that day for a duration of 01:34 minutes. It is reasonable to assume that that related to him listening to the voicemail message left by Mr YJ.

Harassment – issue 1l

10.92 On 12 September 2018 Ms Dean wrote to the claimant requesting him to attend a meeting with her and Mr Agarwal, in his office, on 14 September at 1.00pm "to discuss some operational issues" (797). The Tribunal notes that that date and time is that to which Mr Agarwal referred in his email of 4 September (referred to above) which he, Ms Dean and Ms M already had in their diaries. The claimant replied that that timing conflicted with his responsibilities as he had a morning list at Hartlepool and suggested meeting that day either at 1.00pm at Hartlepool or at 5:30pm. Ms Dean confirmed that 5:30pm meeting by email but the claimant did not access that email in time and, therefore, did not attend (797). Ms Dean therefore called down to the theatre to see if the claimant was there and the person to whom she spoke told her that he had left at about 4.30pm and had "left a right mess".

10.93 The following day, 13 September, Ms Dean spoke to the Emergency Theatre Team Leader regarding the comment that the claimant had "left a right mess". He told her that the claimant had undertaken the World Health Organisation pre-procedure checklist ("WHO checklist") on a patient and then left without informing anyone that he was not intending to undertake the procedure. Another surgeon was found to undertake the procedure and there was therefore no delay. The Team Leader confirmed this in an email to Ms Dean on 20 September 2018 (813) although the Tribunal observes that he states, "List date was 13/09/18" whereas Ms Dean's evidence was that this occurred on 12 September. Ms Dean forwarded this email to Ms M.

10.94 On 14 September Ms Dean wrote again to the claimant suggesting a meeting either that day or on Monday 17 September (796). She then wrote to the claimant a second time on 14 September explaining that she understood that he had assumed that he had a rostered day off on 17 September but he did not and had no fixed commitments. She was therefore "making a reasonable management request that you attend this meeting at 11.00am on Monday 17 September in Mr Agarwal's office at North Tees" (796). Ms Dean telephoned the

claimant early on 17 September when he said that he could not attend the meeting. Ms Dean referred to her previous email and the claimant said that he would email a response. The claimant asked what the issues were. In her witness statement Ms Dean stated that she, "explained that there were some Datix issues that they needed to discuss around on-call/the way he had conducted himself when speaking to a consultant and the junior doctor support he had given. I also needed to speak to him about his theatre scheduling and utilisation and the RMO rota shifts he was doing." The Tribunal notes that Ms Dean does not state that she advised the claimant of the important matter that it was intended "to inform him of not doing on calls from October" as Mr Agarwal had made clear in his email of 4 September 2018. The claimant's response was that the meeting could wait as it did not involve patient safety issues. When Ms Dean reiterated that they needed to speak to him then to go through the issues the claimant responded that he would need to get evidence for the theatre utilisation discussion and he wanted to view the Datixes before attending the meeting. Ms Dean said that that would not be necessary as they would share the information in the meeting itself. The claimant then said that he would meet Ms Dean but not Mr Agarwal as he was disrespectful, there were issues of his job plan that he was waiting to appeal, there had been a grievance and he did not want to meet in Mr Agarwal's office. Ms Dean responded that, as Clinical Director, Mr Agarwal needed to be part of the discussion but she offered to hold the meeting in her office and have an HR representative attend. Once more the Tribunal notes that the presence of Ms M as HR representative had been intended since Mr Agarwal's email of all September: viz "Helen please give your availability to meet with MK, think we have a 1pm on 14th September in our diaries". Ms Dean ended her telephone call to the claimant by confirming her expectation that he would come to North Tees for the meeting on Monday 17 September. Given how difficult she had found this discussion, she emailed Ms M the following day setting out what had happened (747). That email confirms Ms Dean's evidence as set out above.

10.95 The claimant then wrote to Ms Dean on 17 September (09:58) stating that he had been on-call over the past fortnight and he was happy to meet at Hartlepool between 11.00 and 12.00 (795). In her reply (10:52) Ms Dean rejected that alternative due to Mr Agarwal's commitments and restated that they could meet up until 12.30pm that day in her office at North Tees. Also in that email Ms Dean explained that as the claimant had expressed an unwillingness to meet Mr Agarwal, Ms M would also attend the meeting (but the Tribunal again notes that this had been intended since 4 September 2018, which was before the claimant had expressed an unwillingness to meet Mr Agarwal). The claimant replied at 11:11 that he was waiting to meet at Hartlepool as his job plan stated and still had no idea what the meeting was about (795). Ms Dean responded at 11:25, "I am disappointed that you seem to be refusing a reasonable management

request to attend a meeting at North Tees". The claimant replied (11:47) also expressing disappointment that he had not been given any explanation about the matters to be discussed in the meeting or what it was about, he had made the effort and waited in Hartlepool but no one seemed interested and he was happy to attend a meeting at any time even in his own annual leave but Ms Dean was refusing to rearrange it (794). Soon afterwards, this matter became an allegation referred to the disciplinary investigation.

10.96 The email exchanges between Ms Dean and the claimant during 12 to 17 September that are summarised above are an unedifying exchange between two professional people. The question for the Tribunal, however, is whether it amounted, on the claimant's part, to "Failure to follow a reasonable management request to attend a meeting with your General Manager and Clinical Director", which is the first of the eight allegations that led to the disciplinary investigation into the claimant's conduct and his exclusion from the on-call rota (930). Summarising those emails: at 16.17 on 12 September the claimant was informed of the meeting proposed for 14 September; he replied at 11.59 the following day that the time and venue for the suggested meeting were difficult and proposed two alternative times on the day proposed by Ms Dean; the second of those times, 17.30, was accepted by Ms Dean but the claimant did not receive her email to that effect; on 14 September Ms Dean ultimately proposed 11.00 on Monday 17 September at North Tees; due to his work commitments that day the claimant replied that he was happy to meet but at Hartlepool; that was not acceptable due to Mr Agarwal's work commitments and Ms Dean proposed 12.30 at North Tees; the claimant replied that he was waiting at Hartlepool, which disappointed Ms Dean and that led to the claimant stating, "I am happy to attend this meeting at any time even in my own annual leave but you are refusing to rearrange it". In evidence it was clarified that the claimant was on leave during the following two days, Tuesday 18 and Wednesday 19 September. Four days later this matter became a disciplinary allegation.

10.97 It is apparent that the claimant was initially content to attend the meeting but the correspondence then became more adversarial as his concerns were raised. The Tribunal is satisfied that the claimant then became somewhat defensive and a little awkward about meeting but that was primarily due to his work commitments (which was the same reason why Mr Agarwal could not meet in Hartlepool) and this was a relatively short period of five days, which included a weekend. These difficulties could have been avoided had the communications been handled better and with absolute clarity from the outset. In this respect Ms Dean was somewhat duplicitous in that when she told the claimant what the meeting was about she did not tell him that he was to be removed from on-call duties. The Tribunal notes that Ms Dean did mention on-call to the claimant but only in relation to "some Datix issues that we needed to discuss around on-call/the way he had

conducted himself when speaking to a consultant and also the junior Dr support he had given" (747). The claimant's attendance might have been secured if he had been advised that he was required to an "informal discussion" in accordance with the respondent's disciplinary policy (1817) but he was not.

10.98 In the context of the disciplinary allegation, the Tribunal is not satisfied that, the emails summarised above provide any evidence of the claimant refusing to meet; for example, he offered alternatives more than once including during his annual leave in the following two days, which the Tribunal considers to be a reasonable suggestion. The respondent did not, however, take up that suggestion but proceeded to the formal meeting on 21 September.

10.99 Also in this respect, the respondent's Disciplinary Policy and Procedure applies to standards of conduct, performance and attendance, it being provided that "most behaviour or performance issues can be dealt with quickly and informally by an individual's line manager, who will make the individual aware of the standards expected and any improvements required." (1813). As the Tribunal has found above, it is clear from the email correspondence involving Ms Dean, Mr Agarwal, Dr Dwarakanath and Ms M on 4 September 2018 that a primary purpose of the meeting proposed for 14 September was, as Dr Dwarakanath put it, "we need to stop the on calls". The removal of the claimant from the on-call rota does not come within that policy statement of explaining expected standards and required improvements.

10.100 As mentioned, the respondent's disciplinary procedure provides that, wherever possible, there should be informal discussions before formal action is taken except where informal resolution is not appropriate (1817). As set out above, recommendations for informal action were made by Mr Tulloch (and presumably implemented) in respect of surgeons not regularly attending morning emergency meetings despite that being an essential element within their job plan, surgeons undertaking private work and Mr Q not responding to the claimant's request for assistance when he was on-call (284). In contrast, the informal meeting option seems always to have been ignored as far as the claimant was concerned and the Tribunal finds that he was treated differently from others in this regard.

10.101 The failure to meet with the claimant at this time has extra significance in that the oral evidence of many of the respondent's witnesses (for example Ms Lynch and Dr Dwarakanath) was that it was the fact that the claimant had not been prepared to engage in such informal discussions about these matters that meant that they had to be progressed through the formal disciplinary process. The Tribunal repeats that it is not satisfied that the claimant did refuse to attend this meeting.

Direct discrimination–issue 2o; Victimisation–issue 4b; Whistleblowing – issue 8c

10.102 On 21 September 2018, Prof M, Deputy Medical Director, met the claimant. She confirmed their discussion in a letter to him that day, which is headed "Restricted Duties" (930). Prof M informed the claimant that an investigation was to be conducted in accordance with the respondent's procedure for dealing with cases involving Conduct, Capability and Concern about Health or Medical and Dental Staff. This arose from a number of allegations as follows:

10.102.1 Failure to follow a reasonable management request to attend a meeting with your General Manager and Clinical Director
10.102.2 Failure to provide adequate support to a doctor in training whilst on-call – datix W95107
10.102.3 Failure to follow an agreed patient treatment plan whilst on-call – datix W95087
10.102.4 Failure to remain contactable during a period of on-call on 6.9.18
10.102.5 Failure to communicate effectively on 13.9.18 during the emergency surgical list
10.102.6 Unsafe working practices; excessive working hours and inadequate rest
10.102.7 Inappropriate and unprofessional conduct, behaviour and lack of communication
10.102.8 Potential fraudulent activity

Direct discrimination–issue 2p; Victimisation–issue 4c; Whistleblowing – issue 8d

10.103 Prof M informed the claimant that she would act as Case Manager. She had appointed Ms G as Investigating Officer supported by Ms Lynch from HR who would comprise the Investigating Team. Further, in light of the nature of the allegations, particularly the claimant's overall behaviour and alleged lack of communication with teams, she had taken the decision to exclude the claimant "from the on-call rota with immediate effect to prevent any potential patient safety risks."

10.104 The Tribunal considers it surprising that, having excluded the claimant from the on-call rota "to prevent any potential patient safety risks" the letter from Prof M continued that the claimant may nevertheless "undertake work from other private organisations", which the Tribunal understands would include on-call emergency work in light of the claimant's ongoing commitment to the respondent in respect of non-on-call work. This is compounded by Ms Dean suggesting at a later job plan meeting on 2 January 2019 that the claimant was free to take up registrar rota duty at another Trust: i.e. in addition to or as an alternative to the private work referred to in the letter of 21 September 2018.

Direct discrimination – issue 2n; Whistleblowing – issue 8e

10.105 The claimant's job plan appeal took place on 5 October 2018. It was adjourned to enable the appeal panel to seek clarity in respect of a number of points that had been raised and obtain further information. It reconvened on 19 October 2018 (435). One of the aspects of further information it had requested was a statement from Dr Dwarakanath, "in the capacity of an expert witness" (450 and 440). In that statement he explained that he and his predecessor Medical Director had "strived to appoint fully trained consultants to substantive posts, who by definition have had a period of peer reviewed training and have been awarded a CCT or CESR." Dr Dwarakanath went on to explain the role of a consultant and that, "as temporary measure in times of need, a SAS doctor could act into the role of a consultant. However, we would always appoint an individual who had a full set of skills (both clinical and organisational) to a consultant post in the long term; as per College recommendations. Hence, once appropriate candidates were available, with CCTs, we asked Mr Kassem to return to his SAS post." The Tribunal is satisfied that there was nothing untoward in Dr Dwarakanath providing such a statement or in its content.

10.106 Although not information that the appeal panel had requested, Ms Dean submitted what is referred to as a statement "regarding concerns". In that statement, Ms Dean amended an answer that she had given at the 5 October appeal meeting in respect of the claimant's competency to work on the 1st tier (451). She accepted that she had said that the claimant "had the competencies to work independently, hence why we gave him the opportunity to work as a locum consultant on that tier of the rota" but, for the reasons given in her statement, she continued,

> "*Although Mr Kassem has the surgical competency to work independently, the role also includes effective communication, teamwork both within the team and across teams to ensure patient safety is not compromised.*
>
> *There has to be trust, reasoned discussion and support of the clinical decisions made by different teams when on-call. This is especially relevant for our system where the team 1st on call will be handing patients over to be operated upon to the 2nd on call team. I have significant concerns that Mr Kassem does not recognise or would be able to foster these type of qualities or relationship with his surgical consultant colleagues based upon his deep seated belief, irrespective of the investigations and feedback undertaken, that a number of the Consultant Surgeons competencies are of concern*." (452)

Ms Dean explained in her witness statement that this amendment to her previous answer to the appeal panel arose from her being

concerned that throughout the claimant's statement to that panel he had made reference to such matters as the consultants' management of patients and clinical leadership within the Directorate.

10.107 In light of this explanation, the Tribunal has considered the written statement provided by the claimant to the job plan appeal (420). It notes the paragraph at the top of page 2, which is certainly negative but the Tribunal is not satisfied that it provides a sufficient basis for Ms Dean's comments. The Tribunal has not been provided with any notes of the appeal panel meeting on 5 October (which should have been disclosed if they exist) but there is nothing in the appeal outcome letter (462), which provides a summary of the first meeting, that supports Ms Dean's evidence in this respect: particularly that "throughout" the claimant's statement he was raising such concerns. In cross examination, Mr Dean referred, in particular, to the claimant having brought up at the appeal meeting the fact that he was not satisfied with the outcome of his whistleblowing in respect of the 25 patients; she did not suggest that the claimant was wrong to hold the belief that he did but considered it was not a matter to be raised at a job plan appeal meeting.

10.108 Although not one of the claimant's specific issues, the Tribunal (again relying upon its experience as 'an industrial jury') shares the claimant's concern that the appeal panel having obtained further information between its meetings on 5 and 19 October (some requested, some not) proceeded to make its decision and presented the new information and its decision to the claimant at the second of those meetings without giving him the opportunity to comment upon that new information. Indeed, it is recorded in the outcome letter, "I advised you that the panel had now had an opportunity to review the additional information requested and it was not our intention to reopen the discussion since the required clarification had been provided" (465). That said, the Tribunal accepts the reasoned outcome of the job plan appeal that for the reasons set out it concluded that the decision of the panel was "to uphold management's decision to implement the proposed job plan and that it was appropriate that you are no longer required to participate on the consultant emergency rota" (466).

10.109 In light of the outcome of the job plan appeal, Ms Dean wrote to the claimant (466A) inviting him to meet her to resume the job plan discussions on 26 November 2018. Ms CC of HR was also present at that meeting (469). At that meeting, the claimant raised, in addition, two matters that are relevant to the claimant's complaint of unauthorised deduction from his salary. The first was that he considered that he had not received the additional 1 PA on a consultant salary, which he should have received for having undertaken the locum consultant role from March 2015 to September 2017. The second was the point mentioned above (which he had made in his email of 29 September 2017 (282)) about him not being

paid 0.25 in relation to the appraisals he had conducted for some seven years, which Ms Dean said that she felt uncomfortable about.

10.110 After the meeting Ms CC wrote to Ms Johnson on 26 November 2018 (475) regarding the claimant's behaviour at the meeting, which she regarded as unprofessional and led to Ms Dean abandoning the meeting. She expressed her opinion that it was unfair to put Ms Dean in a similar position in the future and suggested that an independent party should be present to facilitate the future discussion between the claimant, Ms Dean and Mr Agarwal.

Whistleblowing – issue 8f

10.111 Ms Johnson wrote to Dr Dwarakanath on 27 November to draw these matters to his attention (477). He then wrote to the claimant on 13 December 2018 (500) informing him that so as to ensure that any reconvened meeting was productive and conclusive he had instructed Prof M to facilitate the job plan discussion along with a member of HR who would provide expert advice. Dr Dwarakanath concluded his letter, "May I remind you also that any further incidents of this nature may result in formal action being undertaken in accordance with Trust HR policy."

10.112 The Tribunal notes two points in particular arising from this letter from Dr Dwarakanath. First, in appointing Prof M into this process, Dr Dwarakanath created a situation whereby the same person had a significant role to play in both the disciplinary and the job plan processes. Secondly, Dr Dwarakanath wrote this letter without seeking the claimant's input into what Ms CC had written regarding his conduct at the job plan meeting. As the claimant said in his response of 2 January 2019 (532), "it would be helpful to ask for my side of the events before making any assumptions" (532). In cross-examination Dr Dwarakanath answered that he had not needed to approach the claimant because he trusted Ms CC; the inference is clear that he did not trust the claimant. He further explained that he had written his letter so as to "nip this issue in the bud". The Tribunal notes, however, that he did not adopt that approach in relation to earlier matters when, for example, Mr Agarwal complained by email of 29 June 2017 (235E) about the claimant's attitude including at the job plan meeting and, after Mr Shanmugam wrote to him about the incident at the handover meeting on 4 June 2018, Dr Dwarakanath had suggested that he should submit a Datix, which he had on 6 June, reference w95087 (454).

10.113 More generally in this respect Dr Dwarakanath did not intervene at an informal level, to nip things in the bud, in respect of the several matters that he referred to the formal disciplinary process. His explanation at the hearing was that when matters are escalated to him as Medical Director, they would normally go through the formal process. In relation to many of these matters, however, Dr

Dwarakanath was not involved as Medical Director as such but was only involved because Mr Agarwal had distanced himself from such matters in relation to the claimant (which he would otherwise have dealt with as Clinical Director) because he was 'conflicted out' (to use a phrase) due to him being implicated in the claimant's grievance. In these circumstances, the Tribunal considers that Dr Dwarakanath, rather than escalating matters, could have 'stepped into the shoes' of Mr Agarwal, in effect as substitute Clinical Director, and sought to resolve and 'nip in the bud' these matters at that level. Dr Dwarakanath explained that he had not adopted an informal approach in respect of the claimant (including rather than writing his letter of 15 December and instigating the disciplinary process) because, as he put it, there was "a lot of traffic coming through" and the range of things caused him to think that it "did need the more formal route". This reinforces the Tribunal's finding that Dr Dwarakanath was instrumental in the decision to pursue matters in accordance with the respondent's disciplinary procedure.

10.114 By letter of 30 November 2018 (483), the claimant was invited to attend an investigatory meeting on 12 December 2018. In that letter, the Investigating Officer explained that the meeting had been arranged in relation to the eight allegations recorded in the letter of 21 September 2018 from Prof M (930).

10.115 The Tribunal has covered above the substance of the majority of those allegations made against the claimant but not the last three, which it now addresses.

10.116 As to the allegation of unsafe working practices, Ms Lynch's evidence in her witness statement was that concerns had been raised in relation to the number of additional hours that were being undertaken by the claimant but the Tribunal is unable to identify the source of those concerns. Suffice it to say that it appears that by mid-September 2018 any issue in this regard had been resolved in discussions between Ms CB, an Administration Manager, and the claimant (950). In particular, it is recorded that the RMO was going live on Healthroster and Ms CB informed the Investigation Team on 12 October that if they ever needed the claimant "to cover we check what he has been doing previously and the day after the shift" (775) i.e the risk of the claimant working excessive hours was being monitored and could be addressed as necessary. This is significant as in its report the Investigation Team refers to the week commencing 10 September 2018 (i.e. before the resolution of this issue). It would also appear from CB's email to Ms Dean of 29 August 2019 (1054A) (which explains the Healthroster system) that if excessive hours were to be worked, Directorate staff would be alerted to reject the doctor from the shift. It also seems from that email that other doctors were working excessive hours but there is nothing before this Tribunal that suggests they were taken through a disciplinary process in those respects. In any event, as the Investigation Team also records, the

Directorate bore some responsibility for ensuring that the claimant did not work excessively. Fundamentally, however, if this is an issue, it would appear to the Tribunal as one for guidance in a pastoral sense rather than being addressed through a disciplinary procedure.

10.117 Ms Lynch explained that the allegation of inappropriate and unprofessional conduct related to three incidents as follows:

10.117.1 a handover on 4 June 2018;
10.117.2 concerns raised by Mr Bhaskar in his email of 18 September 2018;
10.117.3 the claimant's refusal to operate on patients on 12 October 2018.

The first and second of these incidents are addressed above. The third incident arose out of the claimant's concern that the patients were emergencies and he had been barred from undertaking emergency procedures. The claimant's refusal to operate was reported to Mr Agarwal by theatre staff (the claimant says that that was because both he and the anaesthetist were otherwise engaged in the theatre), coincidentally during the meeting of the Investigation Team with Mr Agarwal on 12 October 2018 (740). Mr Agarwal then spoke to the claimant by telephone and asked him to undertake the two procedures. The claimant asked him to put his approval of him doing so in writing, which Mr Agarwal did referring to the patients as being "semi-elective" (862). The claimant replied as follows, "Just to clarify two patients admitted as Emergency decision unit, couldn't be done because Emergency theatre is busy. I am doing them in my list as you have instructed. They are still classed as Emergencies. Thanks" (861). Mr Agarwal forwarded this reply to Ms Dean and she forwarded it to Ms Lynch and Prof M commenting that her view was that although the patients were managed through the emergency team they were semi-elective and were not emergencies. An objective assessment in this respect can be obtained from an email from the anaesthetist involved, dated 15 March 2019 (964). He states that he remembers at the end of the list being informed that "some emergency cases" may have been shifted to us and that he had discussed "the emergency cases" with a colleague. He concludes that nobody from the on-call team told them about the patients in time and they had to run around to do what was necessary, "It was a major communication breakdown." In passing, the Tribunal notes that this suggestion that nobody from the on-call team told them about the patients in time is not dissimilar to the substance of the concerns raised by Mr Bhaskar in his email of 18 September 2018, which were progressed through the disciplinary process yet, if the anaesthetist's account is correct, no action appears to have been taken against the on-call team in this instance. Obviously, the third incident occurred after the claimant's meeting with Prof M on 21 September 2018 and, therefore, it could not have been part of the allegations that were to be referred for disciplinary investigation at that time.

10.118 The evidence of Ms Lynch was that this third incident was added to the list of allegations by Ms Dean even though Prof M was the Case Manager, presumably following receipt by HR of the email from Ms Dean dated 22 October 2018 (861). Mr Agarwal said in cross-examination that he did not escalate this to the disciplinary process and did not raise it as a disciplinary allegation.

10.119 In respect of this third incident, the Tribunal considers that the claimant was not acting unreasonably in seeking clarity and, indeed, protecting his position in light of his suspension from the on-call rota (which would involve undertaking emergency surgery) and the ongoing disciplinary process. It appears that he failed in that objective given that, unbeknown to him, this issue was added to the list of allegations to be taken forward in the disciplinary investigation.

10.120 The final allegation against the claimant is that he had engaged in potentially fraudulent activity. The basis of this allegation was identified by Ms Dean in her witness statement as being that during a review of additional timesheets submitted by the claimant for the period 4 August to 16 September 2018 she had identified that there was an overlap and double-counting for time when he should have been starting his normal scheduled work but was still claiming for his RMO work finishing after that time. More particularly, on 10 and 15 August and 14 September 2018 the claimant had claimed to have finished his 12-hour RMO shifts in Hartlepool at 9.00am but, on each of those days, he should have commenced his scheduled programmed work at 8.30am; that being, on 15 August, a manometry clinic at 8.30am at North Tees. As to 10 August and 14 September, the claimant explained that he had adjusted his working time to accommodate a colleague. The claimant had started his shift at 8.00pm the night before and a colleague attended at 8.00am and they both agreed that so as to avoid confusion they would each claim 12 hours as shown on the rota (i.e. in the claimant's case from 9.00pm to 9.00am), which the claimant suggested is a frequent occurrence between doctors. As to 15 August, the claimant explained that although the manometry clinic started at 9.00am, preparatory work could take 30 to 40 minutes and it had therefore been agreed with the colorectal manager that the claimant's start and finish times could be adjusted so as to be from 9.30am to 1.30pm thus maintaining the same number of hours per session. In these circumstances the claimant denies any overlap in his working hours. The Tribunal accepts the claimant's explanation that the manometry clinic does not start until 9.00am, and not 8.30am as alleged, given that that is supported by the evidence of Mr Tabaqchali, and, in any event, the clinician is not required to be in attendance until 9.30am and the claimant finished at 1.30pm. In this regard, the evidence of Mr Tabaqchali is clear, "the manometry clinic starts at 9.30am, and not 9.00am as stated in his job plan" and given the regular meetings that Mr Tabaqchali (as lead for the colorectal service until 2016) had had with the Directorate management team where all operational,

performance and staffing issues were standing items on the agenda it was "difficult to imagine that the directorate had no knowledge of how the lab or the service works over such a long period of time." Although it is a different point, Mr Tabaqchali concluded his evidence in this respect that he was aware that the claimant "did numerous additional sessions without claiming payments. I therefore think it is a great pity that the directorate has taken this approach rather than thanking him for his hard work and dedication. I would suggest that the directorate overall owe him more pay, not less pay."

10.121 The Investigation Team conducted an extensive investigation; in passing, the notes of its meeting with the claimant run to 65 closely typed pages. Ultimately the Team produced a thorough 40-page report that provides a detailed consideration of the evidence and clear findings (618). That said, the claimant produced an extensive 15-page critique of the report by reference to which he was not directly challenged in cross examination at the Tribunal Hearing. While acknowledging the comprehensive nature of the report the Tribunal is critical of certain aspects.

10.121.1 First, it took what appears to have been an inordinate amount of time to conclude the investigation. The Team did not produce its preliminary draft report until 25 January 2019, on which date the members met with Prof M and then, following a supplementary investigation produced the final report in February 2019. There was further delay until the claimant was provided with a copy of the report with a letter dated 7 March 2019, which invited him to attend a disciplinary hearing on 22 March. Throughout this time, and beyond until April 2020 when the allegations against the claimant were withdrawn, he was suspended from the on-call rota. Ms Lynch confirmed in cross examination that she considered that time period to be "excessive".

10.121.2 Secondly, the Team made assumptions. Examples of this can be found in the following paragraphs:

10.121.2.1 5.1.3.3 – In connection with the claimant's failure to access his emails on 13 September 2018 and, therefore, not being aware that Ms Dean had proposed a meeting at 5.30 that afternoon, the claimant had one of the respondent's mobile phones, "which would have meant that he had a facility for quick access to check on emails"; Ms Lynch confirming in cross examination that the Team had wrongly assumed that the claimant had a smartphone.

10.121.2.2 5.4.3.4 – In connection with the allegation that the claimant had failed to remain contactable during a period of on-call on 6 September 2018, the impact of Mr YJ trying "to contact the claimant and deal with anything that came in took him away from his own responsibilities that morning, which will have had a potential impact on service delivery and patient

safety". In answer to questions, however, Ms Lynch confirmed that Mr YJ had not actually been taken away from his responsibilities and, as he had said, there had been no actual impact but she stressed the word "potential".

10.121.2.3 5.6.4.5 – In connection with the allegation that the claimant worked excessive hours, the claimant leaving the theatres early on 13 September due to feeling unwell and going to Hartlepool to pick up an RMO shift suggested that "this perhaps demonstrated impairment in judgement which may have had an impact on the events outlined throughout this report, in particular the failure to attend the meeting on 13 September with RD and AA, in addition to leaving theatres early on the same day".

10.121.3 Thirdly, the focus of the Team appears to have been upon identifying evidence that supported the allegations that had been made against the claimant and did not approach its task with an open mind including seeking to identify any potential evidence that might exculpate the claimant. Examples of this include the following:

10.121.3.1 With regard to Mr YJ being unable to contact him, the claimant explained that the basic problem was that the night registrar had taken the DECT phone by mistake. The claimant had provided the registrar's name to the Investigation Team as he could have explained everything but they did not contact him because they had information and took the view that they did not need to speak to anybody else.

10.121.3.2 In relation to the third incident considered as part of the fifth allegation that the claimant had failed to communicate effectively on 12 October 2018 during the emergency surgical list, the Investigation Team had interviewed a number of individuals but not, until after the initial draft report had been produced in January 2019, the anaesthetist, the nurse or the operating department practitioner, who had been working with the claimant that day (932, 940 and 942). Moreover, in this respect the Tribunal notes that in its interview with the anaesthetist the Team focused solely on the issues relating to the emergency theatre list on 13 September 2018 and did not explore with him this third incident that occurred on 12 October 2018 in respect of which he was likely to have been able to provide supportive information, given his email to the claimant of 15 March 2019 (964). Also in this connection, the Tribunal notes that in her witness statement Ms Lynch records that the Investigation Team was concerned that the anaesthetist's evidence might not be reliable, explaining in answer to a question that there had certainly been an impression of collusion between him and the claimant.

10.121.3.3 In relation to the final allegation regarding the manometry clinic, Ms Lynch accepted in cross examination that the Investigation Team should have checked what the claimant was to do between 8.30am and 9.30am but they had not done so.

10.121.4 Fourthly, related to the third point above, in respect of many of the allegations the Investigation Team found the allegation to be "upheld" and in one case not "upheld". That is a word the disciplinary hearing might have used but it is inappropriate for that to have been used by the Investigation Team. Ms Lynch accepted in cross examination that was not the best term to use and the Team meant that the allegation was to be put forward to the disciplinary panel.

10.121.5 Finally, the Investigation Team met Prof M on 25 January 2019 and presented its findings in a draft report albeit identifying that there were further points of clarity that were needed such as speaking to the anaesthetist and the two nurses referred to above. Nevertheless, at that meeting Prof M made the decision to progress all the allegations to a disciplinary hearing. In cross examination, Ms Lynch confirmed that she understood this was "not necessarily ideal". The final report was then concluded in February and although, according to Ms Lynch, Prof M would have had oversight of the final draft there was no further meeting between her and the Investigation Team.

10.122 In making the above points regarding the investigation report, the Tribunal is not seeking to suggest that the Investigation Team was in any way improperly motivated. On the contrary, the Tribunal is satisfied that it carried out its investigation into the allegations presented to it to the best of its members' abilities, albeit not in a very timely fashion. The Team conducted its investigation, however, somewhat slavishly following the allegations presented to it without considering, from an HR perspective, whether it was appropriate that those allegations were being pursued through the disciplinary process. Having considered the allegations alongside the evidence that was or could readily have been available to the Investigation Team, the Tribunal considers that the allegations, while not being entirely fabricated or bogus (to borrow the claimant's words) were overstated by the consultants who made them (Messrs Agarwal, Bhaskar and Shanmugam) in which they were supported by Dr Dwarakanath.

10.123 Support is given to this finding of the Tribunal as to the approach adopted by the Investigation Team to its task by two related factors, which were addressed by Ms Lynch in answering questions from the Tribunal. The first is that she explained that in light of the questions and requests for further information received from the disciplinary panel, the Investigation Team had "looked with fresh eyes" at the allegations and the evidence before responding to the panel; and in that regard the claimant's grievance in relation to which he had asked

that the disciplinary proceedings be halted, gave the Team "a bit more time to look at things thoroughly". An inference to be drawn is that in the early stages of its investigation the Team had not looked at matters particularly "fresh eyes" or particularly "thoroughly". Secondly, the disciplinary panel took on board the further information provided by the Investigation Team and its chair fed back on her understanding of the case. Following that, Prof M reviewed the case in its entirety before making the decision not to proceed with the disciplinary proceedings in respect of any of the eight allegations made against the claimant; six of which it was considered could not "be substantiated in their entirety" and they were therefore not upheld. Once more, an inference to be drawn is that Prof M had not "reviewed the case in its entirety" before deciding on 25 January 2019, when the draft Investigation report was presented to her, to progress all the allegations to a disciplinary hearing even though further points of clarity were required.

10.124 Despite the somewhat critical findings immediately above as to the approach of the Investigation Team, the Tribunal can understand the position its members were in given that, on the evidence before the Tribunal, it is satisfied that it was Dr Dwarakanath who decided that the formal investigation process should be instituted and he, being Medical Director, is of course a very senior figure within the respondent. The evidence of Ms Lynch is that it was Dr Dwarakanath's decision. In her witness statement she explained that the failure to hold informal discussions with the claimant "led to an escalation of concerns and a decision taken by Deepak Dwarakanath (Trust Medical Director) to formally investigate the concerns". That reflects the statement in the Background section of the investigation report, at paragraph 2.1, "The failure to achieve an informal meeting between all parties led to an escalation of concerns from the management team and a decision at Executive level by the Medical Director, was made to examine all issues in totality within a formal investigation process" (623). In this respect, in cross examination, Dr Dwarakanath stated that he could not precisely remember who had taken the decision but that his recollection was that it was actually taken by Prof M; the Tribunal does not accept that evidence.

Direct discrimination–issue 2q; Victimisation–issue 4e; Whistleblowing – issue 8i

10.125 The job plan review meeting took place on 2 January 2019 (516 and 523). The outcome of that meeting is recorded in Ms Dean's letter of 4 January 2019 (528). An important feature of the proposed job plan was that the claimant would no longer undertake out of hours or emergency on-call duties as part of the middle grade rota. It was suggested that this change would allow the department to concentrate the claimant's skills on the elective aspects of the service. A new list for acute cholecystitis was proposed in the claimant's name, which would be part of the emergency patient pathway and, as such, contribute to the management of emergency surgical admissions.

This proposal for a dedicated list was in accordance with the NICE guidelines and supported the claimant's request for recognition of autonomous practice. In summary, the proposed job plan took account of the claimant's skills and the requirements of the service and represented the most cost-effective method of delivering the middle grade emergency on-call rota, which would only be staffed by the registrar grade going forward. The claimant expressed his concern about this as he considered it would result in a detriment to his on-call skills which he had developed over a number of years; he would become deskilled within 12 months, would be required to undertake a period of retraining before he could rejoin the rota and his employability elsewhere would be affected. In this connection, Ms Dean suggested that it might be possible to explore the possibility of the claimant providing on-call duties at another Trust. Upon enquiry from the claimant, it was confirmed that he would have would have rights to mediation and, if necessary, a further appeal (517). A further point in this connection that emerged from the oral evidence was the claimant's opinion that even if he were to undertake the proposed new cholecystitis list that did not mean that he needed to be removed from on-call work and he cited colleagues who participated in such work without losing their on-call work.

10.126 On the face of it, had the claimant not made his public interest disclosure and had he not previously been removed from the on-call rota, the explanation for the claimant's new job plan as set out in the preceding paragraph appears to be satisfactory with the focus being upon what was in the interests of the service. There was that background, however, and the Tribunal is satisfied, that the above explanation is little more than a veneer to cover the intention to remove the claimant from the on-call rota because Mr Shanmugam and Mr Bhaskar would not work with him.

10.127 A separate matter considered at this job plan meeting was the claimant's claim that he was not being paid for his appraiser duties, which the claimant had raised in his email of 29 September. Ms Dean explained that this had now been reflected in the proposed job plan using the standard 0.25PA allowance. The claimant requested that this be backdated to 2012 but Ms Dean explained that "this requirement had always formed part of MK's duties and it had not been possible to include this level of detail in previous job plans, however the overall 'envelope' equated to the total PAs being paid. The claimant requested Ms Dean to respond formally to him in writing that he would not receive a separate payment for appraiser duties. In her letter of 4 January Ms Dean recorded her explanation that the claimant's "job plan calculation included the Trust wide Appraiser role and the calculations came out at 14.6 programmed activities. You were currently getting paid 15.5 programmed activities. Your job plan had not changed significantly since 2012/3 and ….. your programme activities had incorporated the Trust Approved appraiser role and therefore the Trust would not be up holding your request for back

payment for carrying out this role back to 2012/13"(528). At the hearing the claimant did not challenge Ms Dean with regard to this explanation, which the Tribunal considers to be well-reasoned and accepts it on the basis set out in Ms Dean's letter.

10.128 The job plan mediation meeting was arranged for 15 January 2019. The claimant objected to this on two bases: first, that it did not give him sufficient time to prepare and obtain assistance from the BMA; secondly, it was proposed that Prof M would be the mediator, which would produce a conflict of interest in that she had taken the decision to suspend him from on-call duties, was the case manager in relation to the disciplinary investigation and had been supportive of the proposed job plan without on-call duty. As such, he engaged in email correspondence with HR during 9 to 14 January 2019 requesting a postponement (543 – 549). In the event, the mediation proceeded on 2 February 2019 with Dr CM as the mediator.

10.129 The Tribunal has recorded above the letter from Dr Dwarakanath of 13 December 2018 (500). The claimant responded to that letter in an email exchange with Dr Dwarakanath from 2 January to 8 January 2019 (532). In the claimant's email of 7 January he stated that he had been given "a different job plan with major changes (no Emergency commitments)" and asserted that he had "suffered constant Victimisation, Bullying and Harassment based on racial prejudice." (530). Dr Dwarakanath did not reply to or acknowledge that email.

10.130 During the course of the disciplinary investigation the claimant had a telephone conversation with Ms Lynch on 23 January 2019, certain issues arising from which she recorded in an email of that date (576). Those issues were that Prof M is abusing her position by taking the decision to remove the claimant from emergency on-call rota; Mr Agarwal and Mr Q are both corrupt and the organisation is doing nothing about it; Prof M is also corrupt now; Mr Bhaskar had falsified patient documentation; Dr Dwarakanath is colluding with Mr Agarwal; Dr Dwarakanath and all the other Indian doctors are working together and talk with each other outside of work on their personal phones; the respondent did not investigate the death of a patient which the claimant had raised last year; the claimant has had to give his SHO to Mr Q to go and work in the Nuffield on his private work; the complications that the claimant raised in relation to Mr Shanmugam have not been investigated or addressed. These concerns were escalated to Ms MT (see below).

10.131 As mentioned above, on 25 January 2019 Prof M met with the investigation team. The upshot of that meeting was that she wrote to the claimant that day and, having set out the same eight allegations, continued, "Based on the findings presented to me, I can confirm that the case will be referred to a disciplinary panel for further consideration" (578).

10.132 Given the ongoing disciplinary process, on 27 January 2019 Dr Dwarakanath authorised the deferment of the claimant's revalidation by the GMC for 6 months to 30 August 2019 (580). The Tribunal accepted Dr Dwarakanath's evidence that this deferment was a neutral act in the circumstances. Indeed, although the claimant had initially raised this as part of an issue in relation to his complaint of victimisation (Issue 4d), he withdrew that part at the Hearing; although continuing with his equivalent complaint in that issue regarding the subsequent further deferment in August 2019.

10.133 By letter of 31 January 2019 (582), the claimant was informed that the job plan mediation meeting would take place on 8 February 2019, conducted by Dr CM. In fact, it appears to have taken place on 2 February 2019. The claimant submitted a written statement (593). He concluded that statement in the following terms, "I can see the trend in our Directorate whereby the majority of appointees invited to the jobs are from Asia and as I am not from the same root I feel the squeeze of the attempts to purge me from the directorate which I feel is discriminatory and racially motivated" (597). Dr CM wrote to the claimant on 20 February 2019 with what the Tribunal considers to be a well-reasoned outcome to the mediation. Her decision was "to uphold the directorate's position and I agree that it is appropriate for your job plan to be altered and for you to be removed from the registrar on-call rota. The directorate have provided suitable explanation as to why the service does not require you to be on this rota and how your skills and experience can be best utilised elsewhere to benefit quality patient care and the service as a whole" (613).

Whistleblowing – issue 8g

10.134 Dr Dwarakanath wrote to the claimant on 7 March 2019 (616) inviting him to attend a disciplinary hearing on 22 March 2019 before a panel of three members one of whom would be him as chairman. He attached the investigatory report comprising 344 pages in total (618).

10.135 As mentioned above, on 10 May 2019 the claimant wrote to Ms Lynch (980) raising matters that were taken forward as a second grievance. He complained that Mr Bhaskar and Mr Agarwal had been "discussing with other colleagues how they managed to frame me to be suspended from the on call duties and referred me to disciplinary hearing they mentioned they have reported datixes and incidents to HR directly, one of our consultant colleagues said they feel proud they managed to do this". Further, that staff had told the claimant that Mr Bhaskar "was talking about how he managed to suspend me from the on call duties, also I am awaiting the disciplinary hearing so that I would be sacked" and "staff in other areas also know about the investigation including almost all my colleagues in the Surgical and some in the anaesthesia directorates". The claimant concluded that he felt "this behavior from senior consultants inappropriate and it constitutes a serious breach confidentiality" (981).

10.136 This grievance was considered by Mr P supported by Ms W of HR. Mr P's outcome letter is dated 13 February 2020 (1154). The Tribunal returns to this grievance outcome in the appropriate chronological order.

10.137 As mentioned above, the matters the claimant had raised in his telephone conversation with Ms Lynch on 23 January 2019 were escalated to Ms MT to be looked into. In addition, the claimant had posed a number of questions to the Investigation Team in the course of its investigation. Ms MT wrote to the claimant on 15 May 2019 (989). She explained that the questions the claimant had posed had been reviewed independently and, having set out those questions in her letter, provided answers to them. As to the several points that the claimant had raised with Ms Lynch on 23 January 2019, Ms MT informed him as follows: the respondent had thoroughly investigated the patient concerns in 2018 and provided him with a detailed overview of the findings; concerns in relation to specific medical colleagues had been addressed; Prof M's decision to remove him from the on-call rota was made in the interests of patient safety; the respondent had comprehensively and thoroughly investigated, following due process, any concerns the claimant had highlighted and an outcome provided to him. In light of the above Ms MT concluded that should the claimant have any information or additional documentation that he wished to submit for further consideration he should do so and she would review accordingly but, "Should I not receive any new information and or evidence to substantiate your claim, I will consider the above matters closed." Finally, she added that she had noted that Dr Dwarakanath had previously had involvement with the concerns the claimant had raised and subsequent investigations and, therefore, she considered it appropriate that an alternative Disciplinary Chair should be appointed to hear the claimant's impending disciplinary case. She had therefore requested that Mrs L should be appointed to chair the disciplinary panel. Mrs L was accordingly appointed and wrote to the claimant on 16 May 2019 (993A). She fixed the date of the disciplinary hearing for 21 June 2019.

10.138 By email of 21 May 2019 (997) the claimant responded to Ms MT's letter of 15 May. He attached a fairly lengthy file containing his comments upon her responses to his concerns as set out in her letter. Within that document the claimant records several matters including the following: what he sees as Ms MTs acknowledgement of Mr Q's serious misconduct and comments that Mr Agarwal had always protected him while subjecting the claimant to constant bullying and harassment which, "culminated by plotting this Bogus allegations" (1000); the double standards and inconsistencies in HR's treatment of the claimant and Mr Q "is very much concerning and illegal, it constitutes a breach to the race relations act" (1001); adverting to Ms MT's decision regarding the chair of the disciplinary panel, the claimant concluded that Dr Dwarakanath had previously been

involved in the whistleblowing patients' safety issues, made the decision to investigate the alleged incidents in totality, agreed to suspend the claimant from on call duty and took the decision to defer his revalidation. On that basis it had been inappropriate for Dr Dwarakanath "to involve himself in the first place, his involvement has raised serious concerns of racial prejudice, retaliation and collusion with Mr Agarwal, Mr Shanmugam and Mr Bhaskar" (1004). A particular matter that the claimant raised in this attachment to his email was a list of 44 patients whom, he said, had suffered adverse complications and death related to inadequacies within the Directorate (1002). The concerns in relation to these patients were considered by Prof M[c]. The Tribunal returns to this matter later in a more appropriate chronological order.

10.139 Under cover of his email to Mr Sheppard of 29 May 2019 (1007), the claimant sought to submit further grievances. The grievances themselves are clear and extremely detailed (1264). The claimant gave several examples of racial discrimination, victimisation and inadequacies in the disciplinary investigation into the allegations against him in respect of which he suggested that the respondent's policy had not been followed. In both the covering email and the detailed statement the claimant referred to racial discrimination contrary to the Race Relations Act and victimisation and retaliation for raising patient safety concerns in the public interest, contrary to the Public Disclosure Act. Having referred to the respondent's disciplinary policy and procedure (section 6.14) and the ACAS guidance he requested suspension of the disciplinary process pending investigation of his grievances.

10.140 Having considered the claimant's statement, Mr Sheppard's view was that the complex issues that the claimant had raised were likely to be considered as part of the ongoing disciplinary investigation and that the appropriate way for the claimant to raise his concerns was as part of that investigation and the disciplinary process itself. He also considered that the claimant had previously raised a grievance, which had been investigated by Mr Tulloch, with his appeal being considered by Ms Thompson. Having considered a summary of the issues previously raised and details of the outcome, Mr Sheppard's view was that all the allegations the claimant was now making had been considered before except for the incident on 10 May 2019 relating to the allegation that other consultants had been discussing his disciplinary process. On this basis, he replied accordingly to the claimant on 10 June 2019 (1019) noting, however, that the 10 May matter was currently being investigated. In summary, in his letter Mr Sheppard recorded his belief that the respondent had taken all appropriate action in relation to investigating any bullying, harassment or victimisation, concerns raised had been independently investigated and previous allegations responded to. As such, unless new evidence or new concerns were to be raised the claimant's grievance was

concluded. He also informed the claimant that he saw no reason to grant his request for the disciplinary process to be stopped.

10.141 By email of 12 June 2019 the claimant replied asking Mr Sheppard to reconsider his decision and, for the reasons he set out, allow his grievance to be investigated suggesting that would happen in respect of issues raised by "staff from other nationalities" (1036). Mr Sheppard reviewed the position in light of the claimant's email but declined to reconsider his position on the grievance commenting, in addition, that he found the claimant's "email to be offensive, inappropriate and unprofessional by suggesting that both myself and the workforce team are racially discriminatory in our practices". He recommended that if the claimant believed to the contrary be should raise his complaint formally with the Chief Executive (1034).

Breach of whistleblowing policy – issue 1e

10.142 Meanwhile, on 6 June 2019, (1016) an employee in the respondent's HR Department sent a copy of the witness statement for another employee, Ms ST, (which contained information related to the claimant) to Ms ST's line manager. The reason for this was that Ms ST had limited email access because she was on holiday. Nevertheless, the respondent accepted that it should not have happened. This was disclosed to the claimant during the course of a meeting he had with Mr W on 29 August 2019 and apologies were offered to the claimant (1056 and 1193).

10.143 On 21 June 2019 the disciplinary panel met to consider the allegations against the claimant. The outcome of that meeting (1047) included that the first and second allegations were struck out: the first because the panel did not believe it merited disciplinary action; the second because the Investigating Team had concluded that it was not upheld and the panel agreed. The panel also sought further information (as set out in the notes and questions that it sent to the Investigation Team) in respect of the remaining six allegations and asked pertinent questions. This outcome was sent to the Investigation Team and the claimant under cover of an email of 9 August 2019 (1046).

Victimisation – issue 4d; Whistleblowing – issue 8h

10.144 On 14 August 2019 the claimant's revalidation was deferred for a second time (1052). The Tribunal accepts Dr Dwarakanath's evidence that there is nothing untoward in this although it considers that it might not have been necessary if swifter progress had been made with the disciplinary process.

10.145 By letter of 28 August 2019 (1053) the claimant was notified that his grievance appeal would take place on 29 August, conducted by Mr W. In the event, at that meeting Mr W informed the claimant as is recorded in his letter of 2 September 2019 (1055) as follows: "I

considered there to be insufficient information and investigation undertaken into your grievance in which to consider both your appeal, the process and subsequent outcome of your grievance. I advised you that it was my recommendation and intention to reallocate the grievance investigation to a new independent investigator who could review the details of your grievance and complete a further detailed and thorough investigation." The claimant confirmed that he was content with this approach, which he said provided him with a degree of trust and confidence in the process and organisation that had recently been lost.

10.146 In this regard, Mr W commissioned Mr P who was supported by Ms W of HR. Mr P met the claimant on 4 October and 6 December 2019 and his letter advising the claimant of the outcome of his appeal is dated 13 February 2020 (1154). Once again, the Tribunal considers this to be an inordinate delay in dealing with an employee's grievance, which was first raised in the claimant's email to Ms Lynch of 10 May 2019 (980).

10.147 The Tribunal interjects at this point that it has thrice referred to delays in the above processes (the disciplinary and two grievance processes) as being "inordinate". That repetition is deliberate and makes the point that such delays are unusual and unacceptable. That is particularly so in this case, however, given the content of the occupational health reports produced in respect of the claimant on 2 July, 5 September and 4 November 2019 (1040, 1057 and 1105). Those reports make the point that the claimant was showing symptoms of stress and anxiety attributed to his work situation and was under considerable pressure in having to prepare for many important meetings in relation to the disciplinary and grievance processes on top of his clinical commitments, which had led to him having a period of sickness absence; the final report encouraged that these processes should be "completed as soon as possible" but that did not happen.

10.148 In Mr P's grievance outcome letter of 13 February 2020 (1154) he addressed separately what he considered were the two discrete elements to the claimant's grievance. He summarised the first element as being the claimant's "Concerns that senior members of Elective Care and the Patient Safety Team had informed others that he was subject to a disciplinary process". In fact, this related to the allegation in the claimant's email to Ms Lynch of 10 May 2019 (980) regarding Mr Bhaskar and Mr Agarwal discussing with other colleagues how they had managed to frame the claimant causing him to be suspended from on-call duties and be referred to a disciplinary investigation as a result of which he would get the sack, and feeling proud of what they had done. Mr P had interviewed the colleagues whom the claimant had told him would be able to support his account but they had not done so; indeed one potential witness had said that no one had said a word about the claimant. The claimant had also been concerned that Dr Dwarakanath's feedback (that had been

recorded on the Datix, reference w95087, that there had been an HR investigation and the person was no longer on the on-call rota) would have been circulated to all those on the 'trigger list', which would also have been a breach of confidentiality. On enquiry, however, Mr P had discovered that this Datix had been closed on the date upon which Dr Dwarakanath's feedback had been recorded and that feedback had only been viewed by Ms Dean, which given her position would not amount to a breach of confidentiality. In short, no evidence had been found to support this element of the claimant's grievance which, therefore, was not upheld.

10.149 Mr P summarised the second element of the claimant's grievance as being the claimant's "Concerns that the Medical Director, Dr Deepak Dwarakanath, had informed your surgical colleagues that you were involved in a whistleblowing process." The Tribunal has already addressed this above but, at risk of repetition, Mr P recorded that the purpose of the meeting on 11 May 2018 "was to discuss the concerns raised, and you were identified in this meeting as the person who had raised them", and Mr P also confirmed that the claimant was cited in Dr Dwarakanath's letter of 25 June 2018. Despite Dr Dwarakanath's explanation that he had not needed to name the claimant as he believed that his colleagues were in no doubt as to who had whistleblown, Mr P was satisfied that there was evidence to substantiate the claimant's allegation that a breach of confidentiality had occurred; and that was in breach of the respondent's "Raising Concerns over (Whistle Blowing) Policy (1750). As such, this element of the claimant's grievance was upheld.

10.150 Under cover of an email dated 6 March 2020 the claimant lodged an appeal in relation to the above grievance outcome (1202). The hearing of that appeal took place on 12 June 2020. The appeal panel did not uphold the first element of the claimant's grievance that senior members of Elective Care had informed others that he was subject to a disciplinary process. The second element of the claimant's grievance appeal related to Dr Dwarakanath's feedback that there had been an HR investigation and the person was no longer on the on-call rota having been recorded on Datix, reference w95087. In that regard the appeal panel considered that it was not necessary to have included the level of update regarding HR-related processes and, additionally, it was unnecessary to have included the claimant's non-participation in the on-call. Further, (in keeping with the observation made by the Clinical Governance Manager at the time) that this Datix should have been rejected initially and resubmitted including only the information pertinent to matters regarding patient safety. In the circumstances this second element of the claimant's grievance appeal was upheld (1260).

10.151 As mentioned above, in the statement that the claimant sent to Ms MT under cover of his email of 21 May 2019 (997) he set out a list of 44 patients whom, he said, had suffered adverse complications and

death related to inadequacies within the Directorate (1002). Ms MT forwarded these cases to Ms Dean for further review, which was undertaken by the surgical management team, that review being concluded in September 2019. Dr Dwarakanath was concerned that this was a further example of patient safety issues being raised in the same clinical area and decided that it was necessary to have an independent external review undertaken to ensure that appropriate and robust governance and assurance processes were in place as, if not, further action would be required. Dr Dwarakanath commissioned Prof M[c] (whom he said was revered in his profession and recently retired) to undertake the review. He commenced the review on 16 October 2019, produced an initial report dated 17 October 2019 (1080) and submitted the final report on 5 November 2019 (1107 and 1094). In his report Prof M[c] made a number of specific comments and, amongst other things, noted, "Overall the impression I gain is that the surgical management of both the elective and the emergency patient in North Tees and Hartlepool Trust is good and that clinical governance procedures are eminently satisfactory" (1089). The claimant was invited to attend a meeting with Dr Dwarakanath in order that he could be given feedback on the report but he declined that invitation and requested, instead, a feedback letter (1152). Such a letter, dated 28 January 2020 (1149), was produced by Dr Dwarakanath and sent to the claimant, along with a copy of the full report under cover of an email dated 17 February 2020 (1164). The claimant was not satisfied with the report and wrote to Dr Dwarakanath suggesting that "the only way to settle these concerns is to utilise the Royal College of Surgeons invited review mechanism (IRM)", which he said, amongst other things, would review the practice of the individual surgeons whom he had named (1164). Dr Dwarakanath considered this suggestion but he did not consider that a further review would provide any additional benefit given that the circumstances of the case reviews undertaken by Prof M[c] remained unchanged, his reputation, experience and standing as one of an expert and his conclusions and suggestions having been discussed with the surgical leadership team. He so advised the claimant in an email dated 2 April 2020 (1246).

Victimisation – issue 4b; Whistleblowing – issue 8c

10.152 Ms Lynch's response to the disciplinary panel's questions and requests for further information (1100), which she submitted under cover of her email of 1 November 2019 (1099), led to discussions between Prof M and Mrs L. Prof M then met Ms Lynch. As Prof M was about to undergo surgery, at that meeting she asked Ms Lynch to draft the disciplinary investigation outcome letter, which she did. That letter is dated 23 March 2020 (1210). In Prof M's absence the letter was signed by Dr Dwarakanath. For some reason that letter was not sent to the claimant until 8 April 2020 (1253). In summary, it is stated in that letter that it was considered that "six out of eight allegations made against you cannot be substantiated in their entirety and are therefore

not upheld" (1213); those six included the two allegations previously struck out by the disciplinary panel. The two remaining allegations were, "Failure to communicate effectively on 13.9.18 during the emergency surgical list" and "Inappropriate and unprofessional conduct, behaviour and lack of communication". With regard to those allegations, it is recorded in the letter that the outcomes of the investigation had left Prof M with a concern that some relationships within the claimant's team may have broken down considerably. As such, she proposed that the claimant and "the following people should enter into formal mediation to address concerns and agree a suitable and appropriate way forward: Mr Agarwal, Mr Bhaskar, Ms Dean, Mr [*YJ*] and Mr Gopinath." In addition, Prof M stated that she considered that it would be helpful to the claimant, "if we were to appoint an agreed mentor for you to work with you on areas such as development, leadership and learning as a senior clinician in your profession"(1214).

10.153 Thus, the disciplinary investigation came to an end. In this regard, however, the Tribunal notes that Mr Sheppard, rather than considering the claimant's grievance letter of 29 May 2019, had referred it into the disciplinary process. Those grievances were not addressed in that process, however, and neither did Mr Sheppard take them back for his consideration in accordance with the respondent's grievance procedure. As Mr Sheppard accepted in answering questions at the Tribunal Hearing, the claimant had raised serious issues. Those issues were never investigated on behalf of the respondent. In this regard, the Tribunal understands the point made by Mr Shepherd in answering questions in re-examination that the matters that the claimant had raised with Ms Lynch on 23 January 2019 (576) were addressed by Ms MT in her letter of 15 May 2019 (989), which she concluded by inviting the claimant to submit any information or additional documentation to her and he was not aware that the claimant had provided any such further information. The Tribunal does not consider that to be the same point, however, as the matters the claimant raised with Ms Lynch are different to those he raised in his grievance letter and very detailed supporting statement of 29 May 2019 (1007 and 1264). Further, when asking her questions of Mr Sheppard, counsel referred him to the email the claimant sent in response to Ms MT (997) attached to which was a statement providing detailed further information such as she had sought. Additionally, Mr Sheppard accepted that he did not follow up on the recommendations referred to above that were made by Prof M as recorded in the disciplinary outcome letter that a mentor should be appointed for the claimant and he and others should enter into formal mediation.

Direct discrimination – issue 2r

10.154 As recorded above, the claimant had had a job plan review meeting on 2 January 2019 and, that not having produced an agreement, a job

plan mediation was held on 2 February 2019 arising from which, by email of 13 May 2019 (983), the claimant exercised his right of appeal. The appeal was heard by Mr SH on 6 March 2020 (1208A). The outcome was that the claimant's appeal was not upheld and the proposed job plan that had been discussed with him during the job plan review and mediation stages was to be implemented. That outcome is recorded in the letter from Mr SH dated 25 March 2020 (1218), which the Tribunal again considers provides an understandable and sustainable explanation for the decision. The Tribunal makes that finding, however, on the footing that it is satisfied that Mr SH made his decision on the basis of the discrete information that was made available to him for the purposes of that appeal, including the operational justification for the claimant's removal from the on-call rota, and, therefore, without any knowledge of the motivation of Mr Shanmugam, Mr Bhaskar, Mr Agarwal and Dr Dwarakanath in seeking that removal. The Tribunal has not considered this particular appeal process and outcome letter in detail as its relevance is limited to a fairly narrow issue that the claimant asserts that by this decision Mr SH stopped him from participating in emergency on-call duties.

10.155 The above concludes the Tribunal's findings of fact in relation to the agreed issues to which the claimant's complaints give rise.

10.156 There have been more recent developments in the employment relationship between the claimant and the respondent including that the claimant wrote to Mr Sheppard on 2 March 2020 to submit what he referred to as his job plan grievances (1208) and, on 6 March 2020 (1201), to appeal against the outcome of his grievance, as considered by Mr P. Although those and other matters are contained in the documents before the Tribunal they were not particularly referred to during the Tribunal Hearing, and as they are not included in the list of agreed issues relevant to the claimant's complaint, the Tribunal has not considered them further; the principal exception to that being the outcome of the grievance appeal, which is referred to above, as that relates to Datix, reference w95087.

Submissions

11. After the evidence had been concluded the parties' representatives made submissions, both oral and written, which painstakingly addressed in some detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. Ms Levene's submissions ran to some 67 pages (to which no summary could hope to do justice) in the course of which she methodically worked through the agreed list of issues highlighting the legal principles in respect of each head of claim and directing the attention of the Tribunal to relevant case law. Mr Kassem's submissions were also detailed, although somewhat shorter, and he too highlighted what he considered to be the key considerations in respect of the issues in his claim, providing interesting diagrams to demonstrate, first, what he considered to be

the correlation between the incidents upon which he relied in support of his complaints and the "whistleblowing" in mid-2018 and, secondly, how he considered the two processes of the job planning and the disciplinary investigation had been coordinated and controlled by Prof M to achieve the same objective of his removal from the on-call emergency duties. It is not necessary for the Tribunal to set out those respective submissions in detail here because they are a matter of record and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to our decision.

The Law

12. The principal statutory provisions that are relevant to the issues in this case are as follows:

12.1 Harassment - section 26 Equality Act 2010

"26 Harassment

(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 in subsection (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.

(5)The relevant protected characteristics are -

…..
race;
….."

12.2 Victimisation - Section 27 Equality Act 2010

"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 -

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

12.3 Section 39 - Employees and applicants

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

…….

(c) *by dismissing B;*

(d) *by subjecting B to any other detriment*.

12.4 Section 40 - Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)-

(a) who is an employee of A's

12.5 Section 136 - Burden of proof

(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.

12.6 Public interest disclosure – Part IVA of the 1996 Act

43A Meaning of "protected disclosure".

In this Act a "protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

48 Complaints to employment tribunals.

…..

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…..

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Application of the facts and the law to determine the issues

13. The above are the salient facts relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law. The Tribunal also brought into account relevant aspects of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Equality Code").

14. While not wishing to limit that general statement, the Tribunal records that in considering the claimant's complaints under the 2010 Act it paid particular attention to 'the reverse burden of proof'. In this regard the Tribunal sought to apply the guidance contained in the decision in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 as approved and adjusted by the Court of Appeal in Igen Ltd v Wong [2005] IRLR 258. The Tribunal reminded itself that, in summary, this involves a two-stage approach. First, it is for the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. Only if the claimant satisfies that initial burden of proof is the second stage engaged whereby the burden then shifts to the respondent to show that, in no sense whatsoever, was the particular treatment on the protected ground. At each stage, the standard of proof is the balance of probabilities.

15. The burden of proof in relation to the claimant's public interest disclosure claim is different. The effect of section 48(2) of the 1996 Act is that it is for the claimant to prove on balance of probabilities that there was a protected disclosure, there

was a detriment, and the respondent subjected the claimant to that detriment. If those elements are proved the burden will shift to the respondent to prove, again on balance of probabilities, that the claimant was not subjected to the detriment on the ground that he had made a protected disclosure; the 'in no sense whatsoever' consideration is of no application in respect of a detriment claim such as this.

16. It is appropriate that in setting out its consideration and decisions in respect of these claims the Tribunal should follow the order of the agreed list of issues and, in that connection, we have adopted, where relevant, the paragraph notation in that list in the following section of these Reasons.

Direct discrimination on grounds of race – sections 13 and 39 of the 2010 Act

17. In respect of the complaint of direct discrimination the list of issues records that the claimant relies upon four actual comparators: Mr Agarwal, Mr Q, Mr J and Mr G. As the evidence developed at the hearing, however, it became apparent that he also relied upon a hypothetical comparator the precise identification of whom was not straightforward as at times the claimant focused upon him being Iraqi but his primary focus appeared to be on him not being Indian, unlike the alleged perpetrators. In this respect it is relevant that section 13 of the 2010 Act refers to discrimination because of race rather than because of the claimant's race. This dual approach of the claimant in this respect is apparent from his written closing submissions in which, on several occasions, he uses phrases to the following effect: "priority is given to Doctors from India, I was treated less favourably as I am from Iraq"; "they allow doctors from India to take part in this process and this is purely because of nationality as I am from Iraq"; he gave "better opportunities to Doctors from his nationality (India) and I was treated less favourably because I am from Iraq"; "I was not given any other role in the Directorate while Doctors from India are given significant roles all the time, this is because I am from Iraq." Although it could be said that these are 'two sides of the same coin' the Tribunal is satisfied (applying section 9 of the 2010 Act) that the claimant's principal emphasis throughout the hearing was on him not being Indian. In this connection, the Tribunal notes that in Orphanus v Queen Mary College [1985] IRLR 349, HL, the House of Lords accepted that a person of 'non-British' origin could form a single racial group in the context of a claim of race discrimination. Although that claim was brought under the Race Relations Act 1976 the Tribunal considers the principle to be equally applicable in this case brought under the 2010 Act, in relation to which the racial group could be described as being of "non-Indian" origin. Allowing the claimant to rely upon a hypothetical comparator rather than limiting him to the four comparators set out in the list of issues is one of the areas in respect of which the Tribunal considered, as set out generally above, that the claimant should have a degree of latitude to depart from the agreed list especially given the haste with which it was produced and, in particular, agreed by him, and that he is a litigant in person.

18. To construct a hypothetical comparator the Tribunal needs to have in mind a person who was in the same, or not materially different, circumstances as the claimant and then consider if the claimant has shown that such a comparator

would have been treated more favourably than him. In this respect the Tribunal reminded itself of the guidance contained in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL including that it can sometimes be preferable for a tribunal, rather than being diverted into confusing disputes about the identification of the appropriate comparator, to concentrate primarily on why the claimant was treated as he was, and whether it was on the proscribed ground or for some other reason. The Tribunal adopted that approach in this case.

19. The acts of direct discrimination relied upon by the claimant are set out in paragraph numbered 2 in this section of the agreed list of issues relating to direct discrimination, which the Tribunal addresses in turn:

a. In early 2011, the claimant did move to the breast team but the reason for that is explained in paragraph 10.3 above. The Tribunal is satisfied that that was not less favourable treatment and did not constitute discrimination.

b. The reduction in the claimant's elective sessions did not amount to less favourable treatment as the Tribunal is satisfied, for the reasons set out in paragraph 10.4 above, that any other person would have been treated in the same way in the same circumstances. Even if it were to be less favourable treatment in the sense that it was to the claimant's disadvantage, the Tribunal is satisfied that such treatment was not because of race.

c. Once more, the Tribunal is satisfied, for the reasons set out in paragraph 10.10 above, that this change in the claimant's job plan was not less favourable treatment and even if it was, it was not because of race.

d. As found at paragraph 10.5 above, the Tribunal is satisfied that Mr Bhaskar did not make a direct threat that if the claimant did not accept the job plan there would be no job available for him. That being so, there was no less favourable treatment of the claimant.

e. As with certain of the above findings, the Tribunal is satisfied, for the reasons set out in paragraph 10.6 above, that not allowing the claimant to participate in the recruitment process was not less favourable treatment and, even if it was, it was not because of race.

f. Likewise the Tribunal is satisfied, for the reasons set out in paragraph 10.11 above, that the removal of the claimant from Mr Gopinath's list was not less favourable treatment and, even if it was, it was not because of race.

g. For the reasons set out at paragraph 10.12 above the Tribunal is satisfied that there was nothing untoward in the appointment of Mr RJ. The respondent needed to appoint a consultant and followed its usual approach of requiring appropriate qualifications which the claimant did

not hold, and the claimant did not apply for the post. Further, even if this appointment was less favourable treatment (again in the sense that it was not something that the claimant wished to happen) it was not because of race.

h. As found at paragraph 10.14 above, it is right that the claimant was not notified directly of the review of Clinical Leads but that was an administrative oversight and the relevant email was forwarded to the claimant within a few days. The Tribunal does not find that this amounted to less favourable treatment and it was not because of race.

i. This issue is considered at paragraph 10.15 to 10.17 above. The Tribunal has found that the allocation of responsibilities was not well-handled; the claimant had expressed a clear interest in two roles and there is no explanation why he was not considered for those roles and was allocated alternative roles. That said, the Tribunal has not found that the intention of Mr Agarwal was to push the claimant away from having a significant role within the Directorate (as he has asserted) and he did not respond to Mr Agarwal's invitation to let him have any corrections/comments/issues arising from the allocations. On balance, the Tribunal does not find that these role allocations amounted to less favourable treatment of the claimant and, once more, even in the sense that it was not something that the claimant wished, it was not because of race.

j. As mentioned above, this issue was withdrawn by the claimant.

k. For the reasons set out in paragraph 10.29 above the Tribunal is satisfied that in respect of no junior doctors being allocated to the claimant he was treated in the same way as other Associates Specialists. As such, this did not amount to less favourable treatment of the claimant.

l. This issue is addressed in paragraphs 10.32 and 10.33 above. The claimant had been 'acting up' in a temporary position as locum consultant and the respondent acted appropriately upon the appointment of the substantive consultant. This being so, this did not amount to less favourable treatment of the claimant.

m. It is right that the claimant's request was rejected but the Tribunal has accepted the reasons for that, which are set out at paragraph 10.47. Thus the Tribunal is satisfied that there was no less favourable treatment of the claimant and, even if there was, it was not because of race.

n. Dr Dwararkanath did provide such an expert witness statement but, as explained in paragraph 10.104, the Tribunal is satisfied that there was nothing untoward in the provision of such a statement or in its content.

o. The meeting on 21 September, which initiated the disciplinary investigation, is principally addressed at paragraph 10.102 above. It was

clearly unfavourable treatment for the claimant or anyone else for such an investigation to be commenced but the question for the Tribunal is whether the claimant was treated less favourably than his named or hypothetical comparators. In this regard, the Tribunal is not satisfied that the eight allegations against the claimant were so weighty as to justify the respondent moving directly to a disciplinary investigation especially given such matters as, first, the alternative provided for in the respondent's disciplinary procedure that wherever possible there should be informal discussions before formal action is taken, secondly, the length of service and standing of the claimant and, thirdly, his having had no patient complaints, claims, serious incidents or serious complications reported against him throughout his employment.

In comparison, as noted above, there was evidence before the Tribunal that the respondent did adopt the informal approach in other circumstances such as in relation to the action points that were recommended by Mr Tulloch relating to surgeons not regularly attending morning emergency meetings despite that being an essential element of their job plan, surgeons undertaking private work when supposed to be on duty for the respondent and Mr Q not responding to the claimant's request for assistance when he was on call.

Notwithstanding the sterling efforts made by Ms Levene on behalf of the respondent in her submissions to the contrary (to which she gave some 1½ pages of her written submissions), the Tribunal has particular concerns regarding the differential treatment as between the claimant and Mr Q, who is from India, and in relation to whom no disciplinary investigation was initiated. Ms Levene sought to distinguish between the claimant and Mr Q on several bases including as follows:

i. There was no evidence that Mr Q avoided a discussion whereas the claimant had refused to attend a meeting with Ms Dean and Mr Agarwal. The Tribunal has found above, however, that there was no such refusal on the part of the claimant. Additionally, there was no evidence presented to the Tribunal of the discussion that Mr Q is said to have had or that it reflected what was to be the discussion with the claimant involving Mr Agarwal, Ms Dean and Ms M. Neither was there any evidence as to action taken as result of the action points recommended by Mr Tulloch.

ii. Ms Levene suggested that, unlike the claimant, there were no issues of adverse behaviour with colleagues or patient safety with Mr Q. The Tribunal does not accept that submission. There was adverse behaviour in that Mr Q did not tell the truth regarding the claimant having telephoned him on 8 December 2016 and maintained that position until Mr Tulloch found evidence to the contrary. Also, there were patient safety issues as the patient concerned was about to be returned to the operating theatre as an emergency yet Mr Q refused his assistance. Ms Levene submitted that what Mr Q said was a

distraction from the real issue that the junior doctor should not have been taken off the ward. The Tribunal does not agree that Mr Q not being open about this matter amounted to a distraction; and as to taking the junior doctor the Tribunal wonders what else the claimant could have done in the circumstances. Additionally, Mr Q did not attend departmental meetings, which both Dr Dwarakanth and Mr Tulloch regarded as being essential. The Tribunal is satisfied that there were issues to be investigated and Mr Agarwal's suggestion that he accepted Mr Q's explanation due to "seniority bias" is not an explanation for no action having been taken when the truth came to light; and it is repeated that the notes of the consultants' meeting on 9 December 2016 were not amended at that stage.

iii. Ms Levene submitted that Mr Tulloch had been clear that Mr Q's private practice did not raise patient safety issue but, as mentioned above, Mr Tulloch had considered only the private work undertaken by Mr Q at the Nuffield Hospital and not that undertaken at the Spire Hospital.

All in all, on the evidence available to the Tribunal it is satisfied as follows:

i. As is clear from the evidence of both Mr Agarwal and Mr Tulloch, Mr Q was conducting his private practice at times when he should have been working for the respondent, and not only at the Nuffield Hospital as identified by Mr Tulloch but also, as was raised with him in cross examination, at the Spire Hospital. Indeed, at the second investigation meeting with Mr Tulloch on 4 August 2017 the claimant had asserted that in one week Mr Q was undertaking private work on 17 July 2017 at Spire Hospital and on 18 and 21 July at the Nuffield Hospital (264). Mr Agarwal's evidence (in his witness statement) was that he addressed this matter by merely reminding Mr Q that he was not to do private work during NHS time and, it seems, being satisfied with the explanation given to him by Mr Q that this was an infrequent event and he had asked a colleague to cover him.

ii. Mr Q failed to attend morning emergency departmental meetings, despite that being an element within a surgeon's job plan, which Mr Tulloch considered to be essential to the preparation for the day ahead and ensuring patient safety. Mr Agarwal suggested in evidence that he had addressed this, not by taking any action against Mr Q but simply by introducing a 'sign in' sheet, but other evidence (including that from Dr Dwarakanth) suggested that surgeons were notorious at not complying with such administrative processes.

iii. Significantly, on 8 December 2016, when Mr Q was telephoned by the claimant he not only declined to come to the hospital to assist him in an emergency situation (leading to the claimant

being taken to task for removing a junior doctor from a ward to assist him in theatre) but, when Mr Agarwal contacted Mr Q the following day, he concealed the truth from him by denying that the claimant had telephoned him. He then continued that deception for some seven months until Mr Tulloch's investigation identified, from telephone records, that the claimant had indeed contacted Mr Q on the night in question whereupon, rather than accepting that he was at fault, Mr Q changed his position and suggested to Mr Agarwal that he had informed him that the claimant had telephoned him that night.

In relation to the initiation of the disciplinary investigation, there is the additional point that, ultimately, none of the allegations against the claimant were upheld in the sense of being progressed to a disciplinary hearing, although the Tribunal does not put great weight on this factor given that it can be the case that an investigation is required before such a decision can be taken.

For these reasons the Tribunal is satisfied that in respect of this issue of initiating the disciplinary investigation the claimant has discharged the burden of proof upon him to establish what is referred to as 'a prima facie case of discrimination': i.e. he has satisfied the Tribunal as to the first stage in relation to the shifting of the burden of proof as is provided for in section 136 of the 2010 Act.

That being so, it is for the respondent to show, on balance of probabilities, that in no sense whatsoever was the initiation of the disciplinary investigation because of race. The above points are also relevant in respect of this second stage. They do not need to be repeated here but, in summary, and in no particular order:

i. The eight allegations against the claimant were not particularly weighty. Indeed, the Tribunal has found above that those made by Messrs Agarwal, Bhaskar and Shanmugam (in which respect they were supported by Dr Dwarakanath) were overstated.

ii. The respondent chose not to follow its disciplinary procedure that wherever possible there should be informal discussions before formal action is taken.

iii. The claimant was not a junior doctor. On the contrary he had long service with nothing negative on his disciplinary record.

iv. The respondent clearly considered him good enough to be a locum consultant and that he had performed that role satisfactorily in that it was twice extended.

v. There was no challenge to the claimant's evidence that he has had no patient complaints, claims, serious incidents or serious complications reported against him throughout his employment.

vi. The Tribunal has found that there was differential treatment as between the claimant and Mr Q as detailed in this section above and that there was no evidence of the informal discussions that the respondent had with Mr Q or the action that was taken against him. This includes, for example, that a disciplinary allegation was made against the claimant in respect of "Potential fraudulent activity", which Ms Dean related to an overlap and double-counting of the claimant's time, which is to be contrasted with any action taken against Mr Q for undertaking private work at the same time as he was rostered to work for and therefore was being paid by the respondent, and the urgency with which any action was taken in relation to the two surgeons.

vii. It is clear that the claimant had seriously upset a number of his colleagues by raising the 25 patient safety issues, which reflected upon their clinical practice, of which they became aware at the consultants' meeting in April 2018 if not before.

The last mentioned point above is significant. The majority of the colleagues whom the claimant had offended by raising the patient safety issues were Indian, including Mr Bhaskar and Mr Shanmugam, and on the evidence before the Tribunal it is satisfied that Mr Agarwal and Dr Dwarakanath, who are also Indian, sympathised and empathised with them, and supported them in this regard. They were as Mr Tabaqchali said in evidence, "A culture within a culture – a group within a group". This is a feature of this case that is of relevance to many of the issues before this Tribunal.

In its consideration of the above matters the Tribunal brings into account that paragraph 3.11 of the Equality Code builds upon previous case law in providing that the characteristic (in this case of race) "needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause." The Tribunal is satisfied that in this case race was a cause of the less favourable treatment of initiating a disciplinary investigation as referred to immediately above and in our findings of fact.

In all the above circumstances the Tribunal is not satisfied that respondent has discharged the burden upon it to demonstrate that the initiation of the disciplinary investigation on 21 September 2018 was in no sense whatsoever because of race.

p. At that same meeting on 21 September, the claimant was suspended from the emergency on-call rota. For essentially the same reasons as are set out in relation to issue o. above the Tribunal is once more satisfied that the claimant has discharged the burden of proof upon him to satisfy the Tribunal as to the first stage in relation to the shifting of the burden of proof.

Moving to the second stage, in the letter of that date (930) it is explained that that decision had been taken in light of the nature of the allegations,

"particularly in relation to your overall behaviour and alleged lack of communication with teams … [*and*] … to prevent any potential patient safety risk." For the reasons explained above, the Tribunal does not find that to stand up to scrutiny particularly given that the letter continues that the claimant might nevertheless "undertake work from other private organisations", which the Tribunal understands would include on-call emergency work. That was then compounded by Ms Dean suggesting at a job plan meeting on 2 January 2019 that the claimant was free to take up registrar rota duty at another Trust: i.e. in addition to or as an alternative to the private work referred to in the letter of 21 September 2018. The Tribunal considers it not to be credible that the respondent would exclude the claimant from the rota in circumstances of his behaviour and lack of communication to prevent potential safety risks yet consider that there would be no issues with him undertaking, first, private work and, secondly, registrar rota duty at another NHS Trust.

In this regard, the Tribunal brings into account the findings made above in relation to the email correspondence of 4 September 2018 to the effect that from there on (indeed from some time before then given that Ms Dean appears to have prepared and submitted to Ms M on 31 August a draft letter to the claimant addressing the job plan process and, with it, the claimant being removed from the on-call emergency rota at locum consultant level) relevant managers of the respondent were intent on removing the claimant from the emergency on-call rota. At risk of repetition at 13:27 that day Ms Dean wrote commenting that it was "really disappointing" that the claimant would be entitled to an appeal, which the Tribunal is satisfied is her highlighting the problem that would be experienced due to the unwillingness of Mr Shanmugam and Mr Bhaskar to undertake on-call emergency work with the claimant, which the Tribunal is further satisfied was because they were angered at him for raising issues regarding their clinical practice. At 13:27 Mr Agarwal responded to Ms Dean that they would need to inform the claimant about not doing on calls from October and at 13:32 Dr Dwarakanath wrote agreeing that the on calls needed to be stopped. As noted above, that was the evidence of Mr Agarwal and Dr Dwarakanath both of whom agreed in cross examination that their intention was to ensure that the claimant being on the on-call emergency rota in any capacity (i.e. as locum consultant or in his substantive role of Associate Specialist) was stopped.

The Tribunal is satisfied on the evidence available to it that the decision to exclude the claimant from the on-call rota was initially taken principally by Mr Shanmugam, Mr Bhaskar, Mr Agarwal and Dr Dwarakanth, all of whom are Indian, and we have found above that the explanation, which is contained in the letter of 21 September, for the claimant being removed from the on-call rota does not stand up to scrutiny. In this connection the Tribunal has again brought into account paragraph 3.11 of the Equality Code as set out above: it is satisfied that in this case race was a cause of the less favourable treatment of suspending the claimant from emergency on-call duties on 21 September 2018 as referred to

immediately above and in our findings of fact. In the circumstances the Tribunal is not satisfied that respondent has discharged the burden upon it to demonstrate that the claimant's removal from the rota was in no sense whatsoever because of race.

q. This issue is considered at some length at paragraphs 10.125 and 10.126 above. In light of the background of the claimant having made his public interest disclosure and having been excluded from on-call rota on 21 September 2018, the Tribunal is satisfied that the claimant has discharged the burden of proof upon him to satisfy the Tribunal as to the first stage in relation to the shifting of the burden of proof.

As to the second stage, once more in light of its detailed consideration of the above background referred to in those paragraphs 10.125 and 10.126 and our finding that the reasons for the removal of the claimant from the rota were race and his having made the public interest disclosure, and taking account of paragraph 3.11 of the Equality Code, the Tribunal is not satisfied that respondent has discharged the burden upon it to demonstrate that the claimant's removal from the rota at this job planning meeting on 2 January 2019 was in no sense whatsoever because of race.

r. This issue relates to the outcome of the claimant's job plan appeal of which he was notified by the letter dated 25 March 2020. The Tribunal has found above that Mr SH made his decision on the basis of the discrete information that was made available to him for the purposes of that appeal, including the operational justification for the claimant's removal from the on-call rota, and, therefore, without any knowledge of the motivation of Mr Shanmugam, Mr Bhaskar, Mr Agarwal and Dr Dwarakanath in seeking that removal but, nevertheless, that that letter provides an understandable and sustainable explanation for the decision. The Tribunal has considered whether it might be said that Mr SH had merely continued and given effect to the earlier discriminatory decisions in this respect but draws (if only by analogy) upon the guidance given by the Supreme Court in the decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55 that the focus of the Tribunal is to be upon the mind of the decision-maker: in this case Mr SH.

In these circumstances, the Tribunal is not satisfied that in this respect the claimant has discharged the burden of proof upon him to establish 'a prima facie case of discrimination': i.e. he has not satisfied the Tribunal as to the first stage in relation to the shifting of the burden of proof. If our decision in that respect had been to the contrary, again for the above reasons, the Tribunal would be satisfied that respondent has discharged the burden upon it to demonstrate that the outcome of the claimant's job plan appeal was in no sense whatsoever because of race.

s. The breaches of policy and confidentiality that are referred to in this issue are addressed below.

Harassment on grounds of race – section 26 of the 2010 Act

20. The Tribunal reminds itself that there are three essential elements to a harassment claim: unwanted conduct, which has the proscribed purpose or effect, and which relates to a relevant protected characteristic.

21. The unwanted conduct relied upon by the claimant is set out in paragraph numbered 1 in this section of the agreed list of issues relating to harassment, which the Tribunal addresses in turn below, in doing so we have used the phrase "violating the claimant's dignity etc." as an abbreviation for each of the elements of purpose or effect set out in section 26(1)(b)(i) and (ii) of the 2010 Act:

    a. The Tribunal is satisfied that applying case law such as in English v Thomas Sanderson Blinds Ltd [2009] ICR 543, Mr Gopinath's cancellation of the claimant's theatre list in February 2011 amounted to unwanted conduct. That said, as recorded at paragraph 10.8 above, he has provided what the Tribunal considers to be a reasonable explanation for that cancellation and, therefore, the Tribunal is not satisfied that such conduct had the purpose of violating the claimant's dignity etc. as more fully set out in section 26(1)(b) of the 2010 Act. As to whether the conduct had that effect, in accordance with section 26(4) of the 2010 Act, the Tribunal had regard to the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. Having done so, the Tribunal is not satisfied that such conduct had the effect of violating the claimant's dignity etc.. In any event, as set out above, the Tribunal is not satisfied that such conduct was related to race.

    b. As explained at paragraph 10.7 above, the Tribunal is not satisfied that Mr Gopinath did delete the claimant's proposal from the minutes of the SLM meeting. That being so, the claimant has failed to establish that there was the unwanted conduct upon which he relies.

    c. The Tribunal has found at paragraph 10.20 above that Mr Agarwal did not repeatedly ask the claimant to provide a statement as part of a Datix investigation. Again, therefore, the claimant has failed to establish that there was any unwanted conduct upon which he relies. Further, as Mr Agarwal only became involved, and appropriately so, when the claimant did not provide a statement to Patient Safety the Tribunal is satisfied that him asking the claimant to provide a statement had neither the purpose nor (again having regard to section 26(4) of the 2010 Act) the effect of violating the claimant's dignity etc. Finally, the Tribunal is not satisfied that Mr Agarwal's intervention was related to race.

    d. It is clear from the evidence before the Tribunal that Mr Agarwal criticising the claimant in front of colleagues on 8 December 2016 did occur. The Tribunal is not satisfied, however, that Mr Agarwal's intended purpose was to violate the claimant's dignity etc. but the Tribunal is satisfied that that was effect of Mr Agarwal's criticism in front of

colleagues. He was essentially challenging the claimant to the effect that he was not telling truth when he had explained that he had contacted Mr Q the night before. This has echoes of Dr Dwarakanath remarking that before writing to the claimant on 13 December 2018 admonishing him about his conduct at the job plan meeting on 26 November 2018 he did not need to approach the claimant for his input because he trusted Ms CC. Nevertheless, the Tribunal is not satisfied that this unwanted conduct on the part of Mr Agarwal related to race. Instead, the Tribunal accepts the evidence of Mr Agarwal that it was related to, as he put it, "seniority bias against the input of a middle grade".

e. At the consultants' meeting on 9 December 2016 Mr Agarwal made it clear that it was, "Paramount that registrar contact the consultant should they take a patient back to theatre out of hours". In the context of Mr Agarwal's criticism of the claimant the day before there can be little doubt that those at the meeting knew that he was referring to the claimant and, therefore, his doing so did amount to unwanted conduct; not least because the claimant knew that in contacting Mr Q he had done precisely what Mr Agarwal was implicitly suggesting he had not done. As such, although not satisfied that in raising this matter at the meeting Mr Agarwal's intended purpose was to violate the claimant's dignity etc. the Tribunal is satisfied that that was the effect. That said, the Tribunal is not satisfied that this unwanted conduct by Mr Agarwal was related to race. Instead, the Tribunal accepts that it arose from "seniority bias" in favour of a consultant and Mr Agarwal's concern that what had occurred on the night of the 7/8 December was not to be repeated.

f. The Tribunal has found at paragraph 10.27 above that Mr Agarwal did not make unpleasant or derogatory remarks about the claimant in this email of 29 March 2017. As such, the Tribunal is not satisfied that the claimant has established any unwanted conduct. To the extent that the claimant might not have wished Mr Agarwal to write the email at all, the Tribunal is satisfied that him doing so had neither the purpose nor the effect of violating the claimant's dignity etc. Finally, the Tribunal is not satisfied that Mr Agarwal's writing of his email was related to race.

g. Mr Agarwal did instruct the booking office to send patients' cards to the claimant and to inform him of the reasons if the claimant declined any of them. The Tribunal is satisfied, however, that for the reasons explained at paragraph 10.28, it was reasonable in the circumstances for him, as Clinical Director, to give those instructions. As such, although there was conduct that was unwanted by the claimant, the Tribunal is satisfied that violating the claimant's dignity etc. was the neither the purpose nor (again having regard to section 26(4) of the 2010 Act) the effect of Mr Agarwal's instructions. Finally, the Tribunal is not satisfied that Mr Agarwal's giving of those instructions was related to race.

h. At paragraph 10.33 the Tribunal has accepted that during the course of the meeting on 19 May 2017 Mr Agarwal shouted at the claimant and indicated that if he did not accept the proposed job plan

there would be no job available for him in the Directorate. Clearly this amounts to unwanted conduct but the Tribunal is satisfied that violating the claimant's dignity etc. was the not the purpose of Mr Agarwal's conduct. It is satisfied, however, by reference to section 26(4) of the 2010 Act, that the effect of Mr Agarwal's conduct was to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In this regard the Tribunal has brought into account the evidence of Mr Tabaqchali that shortly after the job plan meeting the claimant went to see him and that he was visibly upset and told him that Mr Agarwal had shouted at him and humiliated and bullied him during the meeting; further, that the claimant presented as being clearly worried, visibly shaken and very upset by the encounter. That said, the Tribunal is not satisfied that this conduct of Mr Agarwal at the meeting was related to race but was more born out of the frustration that Ms Dean said in evidence both she and Mr Agarwal experienced at the claimant's attitude.

i. This issue is addressed in paragraphs 10.38 to 10.40 above. For the reasons stated there, the Tribunal is satisfied as to both limbs of this assertion: at the M&M meeting Mr Agarwal, first, accused the claimant of having no common sense and, secondly, made unfounded allegations against him that the anaesthetist was very much concerned about the large quantity of bile leak. In light of those findings, the Tribunal is satisfied that Mr Agarwal's conduct was very much unwanted by the claimant. Additionally, given the senior position of Mr Agarwal as Clinical Director, the Tribunal is of the view that such conduct had the purpose of violating the claimant's dignity etc. In this regard, the Tribunal notes that by the date of the M&M meeting the claimant had submitted his grievance on 14 June 2017, much of which was focused on the conduct of Mr Agarwal, both generally and towards the claimant personally, and he had referred to "bullying and harassment, prejudiced and unfair treatment and the motives behind it". Additionally or alternatively, whether or not the intended purpose of Mr Agarwal's conduct was violation of the claimant's dignity etc, the Tribunal is satisfied (again taking account of the elements contained in section 26(4) of the 2010 Act) that his conduct certainly had that effect.

As to whether or not Mr Agarwal's conduct was related to race, the Tribunal returns to its consideration of the two stages of the burden of proof. For the above reason the claimant has satisfied the Tribunal on the balance of probabilities that he was subjected to unwanted conduct which had the effect of violating his dignity etc. even if it did not have that purpose; further, in light of his evidence and that of Mr Tabaqchali (including his remark during cross examination that within the Directorate there was "a group within a group") the claimant has satisfied the Tribunal that Mr Agarwal's conduct could be related to race. For these reasons the Tribunal is satisfied that the claimant has discharged the burden of proof upon him to establish 'a prima facie case' and, as such, it is for the respondent to show on balance of probabilities that in no sense whatsoever was Mr Agarwal's conduct related to race.

In this regard, the Tribunal again refers to the evidence of Mr Tabaqchali to the effect that Mr Agarwal's conduct at the M&M meeting was extraordinary; it did not reflect the way in which such meetings were normally conducted. To summarise, his evidence was that the claimant was interrupted repeatedly, his actions were strongly criticised by Mr Agarwal who stood up, was very animated and sometimes shouted in an intimidating manner, at one point telling the claimant that he did not care about his patient and that his performance was substandard. So much was Mr Tabaqchali surprised by Mr Agarwal's conduct that he intervened and asked for all interruptions to be stopped. There is also the evidence of the email from the anaesthetist that, contrary to what Mr Agarwal said at the meeting, he had not raised any patient safety issues in respect of the patient with the biliary leak.

On these bases, the Tribunal finds that the respondent has failed to satisfy it that, in no sense whatsoever, was Mr Agarwal's conduct related to race.

j. The reference in this issue to Mr Agarwal encouraging Mr Bhaskar and Mr Shanmugam to report incidents and complaints against the claimant is taken to be to the emails that they wrote and the Datix each of them submitted on 6 June 2018, and the subsequent emails that each of them wrote to the effect that they did not want to undertake on-call duties with the claimant. In these respects there is evidence that Mr Shanmugam wrote to Mr Agarwal on 4 June 2018 about the argument that he had had with the claimant that morning and sent him a copy of his email of 9 August 2018 to Ms Dean about the on-call rota, and before Mr Bhaskar submitted his Datix he discussed matters with Mr Agarwal who agreed that it should be submitted and Mr Bhaskar wrote to Mr Agarwal on 18 September about the on-call rota. There is no evidence before the Tribunal, however, that Mr Agarwal encouraged these two men in the way asserted in this issue. As such, the Tribunal is not satisfied that there was any such unwanted conduct.

k. This issue contains two elements: the first is that on 4 September 2018 of Mr Agarwal and Dr Dwarakanath agreed a plan to remove the claimant from emergency on-call duties.

The factual basis of this element of this issue is the email correspondence on 4 September 2018 that the Tribunal has thoroughly considered above. As at that date the only formal step that had been taken with regard to the claimant being on the emergency on-call rota was the email referred to immediately above that Mr Shanmugam wrote to Mr Agarwal on 4 June and the Datix he submitted two days later on 6 June 2018. It was these two matters that informed the management decisions to remove the claimant from the on-call rota through the job plan process. The Tribunal repeats the it is satisfied that that was the intention of Ms Dean when she wrote to Ms M but she was frustrated in that intention when Ms M replied the claimant would be entitled to an appeal (413). At risk of repetition, that led to the rapid exchange of emails

on 4 September (412). Ms Dean initiated that correspondence with her remark, “This is really disappointing and concerning as he is due to commence his next round of emergency surgery in October”. The Tribunal has considered why she would have made that remark, about which there was obviously some urgency as she continued, “I’m in the office all afternoon if you can ring me when you are free”. The Tribunal is satisfied that the answer to our question is that Ms Dean raised this issue, and of her disappointment and concern, because she was part of the decision-making regarding the removal of the claimant from the on-call rota. Further, Mr Agarwal and Dr Dwarakanath were equally part of that decision-making as within 15 minutes they had each replied to the effect that the claimant doing on-calls needed to be stopped, which it is repeated they both agreed in cross examination was their intention.

A further factor is that Dr Dwarakanath denied that he had played any part in the claimant’s removal from the rota but, as set out at paragraph 10.89 above, the Tribunal has found to the contrary. Additionally, around this time, the claimant was excluded from the emergency on-call rota at the meeting on 21 September yet, as detailed above, at the same time it was agreed that he was free to undertake private work and, soon after, that he could undertake registrar rota duty at another Trust; this suggesting that there was apparently no clinical reason why the claimant could not undertake emergency on-call work as, if there had been, to have permitted him to do so elsewhere could be seen as being at least reckless.

In light of the above evidence and findings, the Tribunal is satisfied, as to the first element in this issue, that on 4 September 2018 (if not somewhat before then) Mr Agarwal and Dr Dwarakanath did agree a plan to remove the claimant from emergency on-call duties. That was once more very much conduct unwanted by the claimant. Further, again given the senior positions of Mr Agarwal as Clinical Director and Dr Dwarakanath as Medical Director, and the claimant having raised his grievance, the focus of which was on the conduct of Mr Agarwal, the Tribunal is inclined to the view that such conduct did have the purpose of violating the claimant’s dignity etc. Whether or not that was their intended purpose, the Tribunal is satisfied (again taking account of the elements contained in section 26(4) of the 2010 Act) that this conduct certainly had that effect.

Thus the claimant has satisfied the Tribunal on the balance of probabilities that he was subjected to that unwanted conduct which had the effect of violating his dignity etc. even if it did not have that purpose; further, that in all the circumstances this could be related to race. For these reasons the Tribunal is satisfied that the claimant has discharged the burden of proof upon him to establish ‘a prima facie case’ in respect of the first element in this issue and, therefore, it is for the respondent to show on balance of probabilities that in no sense whatsoever was the conduct of Mr Agarwal and Dr Dwarakanath related to race.

In light of the discussion in the second and third subparagraphs above in respect of this issue (particularly regarding the content and rapidity of the email correspondence between Ms Dean, Mr Agarwal and Dr Dwarakanath on 4 September) and the claimant having by now raised his grievance the Tribunal finds as to this first element, that the respondent has failed to satisfy it that, in no sense whatsoever, was the conduct of Mr Agarwal and Dr Dwarakanath related to race.

The second element of this issue is that Mr Agarwal and Dr Dwarakanath agreed to "fabricate more incidents against the claimant". There is no evidence before the Tribunal as to that second element and, therefore, the Tribunal finds that there was no unwanted conduct in this respect.

l. As the Tribunal has found above persistent efforts were made by Ms Dean during the period 12 to 14 September 2018 to have the claimant attend a meeting with her and Mr Agarwal during the course of which the correspondence became more adversarial and the claimant became progressively defensive and a little awkward. The Tribunal is not satisfied, however, that Ms Dean's persistence in seeking to achieve the meeting amounted to her having "harassed" the claimant as is referred to in this issue; whether that word is taken in the sense that it might be used in common parlance or in the sense explained in section 46 of the 2010 Act. The context for this was that Ms Dean was tasked with setting up the meeting between an employee and his Clinical Director. It is clear from the claimant's correspondence that he found this conduct to be unwanted but the Tribunal is satisfied that the purpose of Ms Dean's communications with the claimant was to organise that meeting and not for the purpose of violating the claimant's dignity etc. Also, having had regard to the matters referred to in section 26(4) of the 2010 Act, including the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect, the Tribunal is not satisfied either that Ms Dean's persistent communications had that effect. In any event, given that, it is repeated, that the driver for this was to arrange the job plan meeting the Tribunal is not satisfied that the unwanted conduct perceived by the claimant was related to race.

m. The breaches of policy and confidentiality that are referred to in this issue are addressed below.

Victimisation – section 27 of the 2010 Act

22. The acts relied upon by the claimant as protected acts are set out in paragraph numbered 2 in this section of the agreed list of issues relating to victimisation, which the Tribunal addresses in turn:

a. The Tribunal has recorded at paragraph 10.35 above that in the grievance the claimant submitted on 14 June 2017 he did not expressly mention the protected characteristic of race but he did refer to "bullying and harassment, prejudiced and unfair treatment and the motives behind it" and, at the second investigation meeting on 4 August 2017 the

claimant made express reference to issues of ethnicity and race. By reference to section 27(2)(c) and (d) of the 2010 Act, the Tribunal is satisfied that the claimant raising this grievance constituted a protected act.

b. The claimant's appeal on 24 October 2017 carried forward the grievance and, therefore, the protected act. Additionally, as recorded at paragraph 10.51 above, in the appeal letter the claimant made reference to Mr Agarwal treating his close friends favourably and him less favourably which he said was "contrary to the law and to the GMC code of practice". The Tribunal is thus satisfied that the appeal is also a protected act.

c. The claimant's second grievance of 10 May 2019 related to what he regarded as being inappropriate behaviour by senior consultants and a serious breach of confidentiality. The Tribunal is not satisfied that those complaints come within any of the subsections of section 27(2) of the 2010 Act and, therefore, finds that this grievance was not a protected act.

23. In Shamoon the House of Lords held that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The Tribunal brings into that account along with the Equality Code in which, drawing on relevant case law it is stated, "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage". The detriments relied upon by the claimant are set out in paragraph numbered 4 in this section of the agreed list of issues relating to victimisation, which the Tribunal addresses in turn (although not issues f. to h. as they relate to remedy):

a. There are two aspects to this issue. First, what the claimant saw as him being downgraded from his on-call emergency duties. At paragraph 10.33 above the Tribunal has found that the claimant was not downgraded and that the respondent acted appropriately upon the appointment of the substantive consultant. In light of the above guidance as to the meaning of detriment, however, the Tribunal is satisfied that ending the claimant's on-call locum consultant role was a detriment. That said, for the reasons set out in its findings of fact above the Tribunal is not satisfied that the reason why that role ended was because he had raised his grievance.

The second aspect is the Directorate rejecting the claimant's request to work without supervision, which the Tribunal has addressed at paragraph 10.48 above. Once more, although the Tribunal has accepted that the respondent's response to the claimant's request was appropriate, given the guidance regarding the meaning of detriment, the Tribunal is satisfied that this decision about which Ms Dean notified the claimant on 27 September 2017 did amount to a detriment. Again, however, for the reasons set out in its findings of fact above , the Tribunal

it is not satisfied that that decision was because the claimant had raised his grievance.

b. The disciplinary investigation was undoubtedly prolonged with some stages being delayed and certain of the allegations being overstated. The Tribunal is not satisfied, however, that the allegations were bogus or fabricated and, ultimately, the outcome was in favour of the claimant. For reasons similar to those set out above, the Tribunal is satisfied that the investigation did amount to a detriment but it was not because the claimant had raised or appealed in relation to his grievance.

c. Similarly, in relation to the claimant suspension from emergency on-call duties the Tribunal is satisfied for the reasons set out in its findings of fact above that this does amount to a detriment but was not because the claimant had raised or appealed in relation to his grievance.

d. At the hearing the claimant withdrew his complaint in respect of the deferment of his licence and revalidation in January 2019 and the Tribunal has accepted the evidence of Dr Dwarakanath that there was nothing untoward in the second deferment in August 2019. As such, the Tribunal is not satisfied that it amounted to a detriment.

e. As with the majority of the above issues, the Tribunal is satisfied that the outcome of the job plan review meeting on 2 January 2019 that the claimant would no longer undertake out of hours or emergency on-call duties as part of the middle grade rota was undoubtedly a detriment but the Tribunal is not satisfied that the reason for that decision was because he had raised or appealed in relation to his grievance.

i. The breaches of policy and confidentiality that are referred to in this issue are addressed below.

24. In relation to each of the above where the Tribunal has found there to have been detriment it has found that such detriments were not because the claimant had done a protected act. To find otherwise the Tribunal would have to be satisfied that a large number of people were involved in a conspiracy against the claimant but there is no evidence of that.

Public interest disclosure claim – sections 43A to 43C and 47B of the 1996 Act

25. Some preliminary points should first be made in relation to the claimant's public interest disclosure claim. The Tribunal has brought into account the guidance of the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436 as to what constitutes a protected disclosure. Additionally, that in Babula v Waltham Forest College [2007] IRLR 346 the Court of Appeal clarified that in establishing that the person making the disclosure has a reasonable belief that the disclosure is made in the public interest if is sufficient if he or she has a subjective belief, which is objectively reasonable. As to the existence of detriment, the Tribunal has once more relied upon the guidance in Shamoon and reminds itself that in NHS Manchester v Fecitt [2012] IRLR 64

the Court of Appeal held that the question in detriment cases is whether "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"; the focus of the Tribunal being upon the mind or mental processes of the individual or individuals occasioning the alleged detriment: see Jhuti.

26. The disclosures upon which the claimant relies are set out in paragraph numbered 2 in this section of the agreed list of issues. In submissions Ms Levene clarified that the respondent admitted that the claimant had made the disclosure on 20 September 2018 that is referred to in subparagraph 2(a)(ii) and the disclosures listed in subparagraphs 2(a)(iii) to 2(e) but did not admit those in subparagraphs 2(a)(i) or the disclosure on 12 February 2017 that is referred to in subparagraph 2(a)(ii). The Tribunal accepts this differentiation between what are and are not disclosures that might qualify for protection. The Tribunal also accepts that in the claimant's reasonable belief the information disclosed tended to show, as is set out in section 43B(d) of the 2010 Act, "that the health or safety of any individual has been, is being or is likely to be endangered". In these respects, Ms Levene conceded on behalf of the respondent that if the disclosures contended for by the claimant were made they would be made in the public interest and were made to the claimant's employer. Finally by way of introduction the Tribunal records, first, in respect of disclosure 2b. (the claimant raising issues of Mr Q's misconduct on 4 August 2017) that there is no evidence that the claimant raising such issues led to the detriments considered in the next paragraph and, secondly, that the disclosures in subparagraphs 2d. and 2e. came after the detriments referred to in subparagraphs 8a. to 8g.

27. The detriments upon which the claimant relied in this respect are set out in paragraph numbered 8 in this section of the agreed list of issues relating to the claimant's public interest disclosure claim, which the Tribunal addresses in turn (although not issues j. to l. as they relate to remedy):

    a. The Tribunal has found above that the claimant made a protected disclosure when, at the second grievance meeting on 4 August 2017, he provided to Mr Tulloch a list of 25 patients whom he considered had suffered morbidity, harm and unnecessary death; this being carried forward into the consultants' meeting in April 2018. Additionally, having focused on the minds of Mr Shanmugam and Mr Bhaskar, the Tribunal has made a specific finding at paragraph 10.88 above that they respectively submitted their Datixes with the express purpose of removing the claimant from the emergency on-call rota; further, that their reason for that was that he had criticised their clinical practice when he raised his concerns in respect of the 25 patients.

    Thus, the claimant made a protected disclosure and was subjected to detriment by the respondent; in the shape of Mr Shanmugam and Mr Bhaskar. As such, in accordance with section 48(2) of the 1996 Act the burden of proof shifts to the respondent to prove, on balance of probabilities, that the claimant

was not subjected to detriment on the ground that he made the protected disclosure. On the evidence available to the Tribunal as considered above it is not satisfied that the respondent has discharged that burden of proof. On the contrary, the Tribunal is satisfied that the motivation of Mr Shanmugam and Mr Bhaskar in submitting those Datixes (being the detriment) was that the claimant had made that protected disclosure.

That said, as found in relation to issue 1j. of the claimant's harassment claim there is no evidence of Mr Agarwal having encouraged Mr Bhaskar or Mr Shanmugam to submit their respective Datixes.

b. The Tribunal has explained above its findings in relation to the email exchanges on 4 September 2018 and being satisfied that the purpose of that email exchange was to stop the claimant's on-call emergency duties. The claimant had made a protected disclosure and, having focused on the minds of Ms Dean, Mr Agarwal and Dr Dwarakanath, the Tribunal is satisfied that he was subjected to detriment by the respondent, in the shape of those three individuals. As such, in accordance with section 48(2) of the 1996 Act the burden of proof shifts to the respondent to prove, on balance of probabilities, that the claimant was not subjected to detriment on the ground that he made the protected disclosure. Again having focused on the minds of those three individuals, on the evidence available to the Tribunal (again as set out at some length above in relation to the email exchanges) it is not satisfied that the respondent has discharged that burden of proof.

c. As stated in relation to paragraph 4b. of the claimant's victimisation complaint the Tribunal has found that the investigation did amount to a detriment. Given that the claimant had made a protected disclosure and the Tribunal being satisfied that the respondent subjected him to that detriment, the burden of proof again shifts to the respondent to prove that the claimant was not subjected to the detriment on the ground that he made the protected disclosure. Having considered the mental processes of those involved in instituting and progressing the disciplinary investigation, for the reasons set out in its findings of fact above, the Tribunal is not satisfied that the respondent has discharged that burden of proof to the satisfaction of the Tribunal.

d. Similarly, the Tribunal is satisfied that the claimant being suspended from the emergency on-call duties from 21 September 2018 was a detriment to which he was subjected by the respondent. Now focusing on the minds of Ms Dean, Mr Agarwal and Dr Dwarakanath who sought to have the claimant removed from the on-call rota and Prof M who gave effect to the suspension, for the reasons set out in our findings of fact the Tribunal is not satisfied that the respondent has discharged the

burden of proof upon it to show that that was not because he made the protected disclosure.

e. The Tribunal has found above that there was nothing untoward in the expert witness statement provided by Dr Dwarakanath or its content, which explain the respondent's approach to appointing fully trained consultants to substantive posts. While it might be that in the context of the claimant's job plan appeal the claimant could reasonably consider that that statement was to his disadvantage and therefore amounted to a detriment, the Tribunal is not satisfied that the statement was provided because the claimant had made a protected disclosure. As such, any detriment was not on the ground that he had made a protected disclosure.

f. The letter Dr Dwarakanath wrote to the claimant on 13 December 2018 is considered at paragraph 10.111 above. The Tribunal is satisfied that such a strongly worded letter written by someone of such seniority and authority in the respondent's organisation did constitute a threat of disciplinary action and that was a detriment. The letter therefore amounted to a detriment to which the claimant was subjected by the respondent (in the shape of Dr Dwarakanath). The Tribunal is satisfied that Dr Dwarakanath's motivation in writing this letter was bound up with the claimant having raised his concerns in respect of the 25 patients as a result of which Mr Shanmugam and Mr Bhaskar were no longer willing to work with him on the emergency on-call rota and Ms Dean, Mr Agarwal and Dr Dwarakanath then agreed that the claimant should be removed from that rota, all of which is set out in more detail in the Tribunal's findings of fact above. For those reasons, and having considered the mental processes of Dr Dwarakanath, the Tribunal is not satisfied that the respondent has discharged the burden of proof upon it to show that the letter was not written on the ground that the claimant had made a protected disclosure.

g. In his letter of 7 March 2019 Dr Dwarakanath informed the claimant that he would be one of the three members of the disciplinary hearing panel; indeed he was to be its chair. Given Dr Dwarakanath's previous involvement the Tribunal is satisfied that that was to the claimant's detriment, which is reinforced by Ms MT having explained in her letter to the claimant of 15 May 2019 that due to that involvement she considered it appropriate that an alternative chair should be appointed. Thus, there is again the protected disclosure and detriment to which the respondent submitted the claimant. Once more on the evidence available to it and again having focused upon the mental processes of Dr Dwarakanath, the Tribunal is not satisfied that the respondent has discharged the burden of proof to show that Dr Dwarakanath appointing himself as chair of the disciplinary panel was not on the ground that the claimant had made a protected disclosure.

h. As explained above, at the hearing the claimant withdrew his complaint in respect of the deferment of his licence and revalidation in January 2019 and the Tribunal has accepted the that there was nothing untoward in the second deferment in August 2019. As such, the Tribunal is not satisfied that it amounted to a detriment**.**

i. As also explained above, the Tribunal is satisfied that the outcome of the job plan review meeting on 2 January 2019 that the claimant would no longer undertake out of hours or emergency on-call duties as part of the middle grade rota was undoubtedly a detriment to which the claimant was subject by the respondent. Having focused primarily on the minds of Mr Agarwal and Ms Dean who had conduct of that meeting but more generally upon the mental processes of all those referred to above who had sought to have the claimant removed from the on-call rota, on the evidence available to it as summarised above, the Tribunal is satisfied that the respondent has failed to discharge the burden of proof to show that the claimant no longer undertaking such duties was not on the ground that he had made a protected disclosure.

Alleged breaches of policy

28. The claimant relied upon five breaches of the Whistleblowing and Disclosure Policy in respect of which the decisions of the Tribunal are as follows:

a. The confidentiality of the person raising the concern is preserved by paragraph 2 of Appendix 1 to the respondent's policy (1757). The Tribunal has found above that Dr Dwarakanath did breach the claimant's confidentiality in the meeting with consultants on 11 May 2018. Indeed, that was the finding of Mr P in relation to the claimant's second grievance. It follows that there was a breach of this policy.

b. In his letter of 25 June 2018 Dr Dwarakanath expressly referred to the claimant by name. One of the outcomes of the claimant's second grievance was that Mr P was satisfied that there was evidence to substantiate the claimant's allegation that a breach of confidentiality had occurred; and that was in breach of that policy. As such, this element of the claimant's grievance was upheld. The Tribunal too is satisfied that this amounted to a breach by Dr Dwarakanath of this policy.

c. On 12 October 2018 feedback from Dr Dwarakanath is recorded on the Datix w95087 as being that "there has been a HR investigation and the person is no longer on the on-call rota. Incident closed." The outcome of the claimant's grievance appeal on 12 June 2020 included that it had not been necessary to have referred to the level of update regarding HR-related processes and, additionally, it was unnecessary to have included the

claimant's non-participation in the on-call. Thus this element of the claimant's grievance was upheld. The Tribunal agrees with that assessment by the appeal panel that it was wrong to have made these references in a document with fairly wide circulation. The claimant's allegation in this issue is that this was "distributed …. to all members of staff". Although it was accessible by relevant staff the Tribunal is not satisfied that it was distributed and in any event it was not distributed to all staff. As such, the Tribunal does not uphold this specific allegation in these terms but it is satisfied that, more generally, the circumstances did amount to a breach of this policy

d. As is recorded above, in relation to the claimant's second grievance, Mr P had interviewed the colleagues whom the claimant had told him would be able to support his account but they had not done so; indeed one potential witness had said that no one had said a word about the claimant. In these circumstances (not least in light of the appeal panel's finding), and in the absence of any evidence from the claimant in this respect, the Tribunal does not find this allegation to be well-founded.

e. As also recorded above, the allegation in this issue withdrawn by the claimant.

29. The claimant relies upon the above breaches of the whistleblowing policy in relation to his complaints of direct race discrimination, harassment and victimisation. Although the circumstances in subparagraphs a., b. and c. above were breaches of that policy the Tribunal is not satisfied that the breaches amounted to any of the following:

29.1 direct discrimination by treating the claimant less favourably because of race;

29.2 acts of harassment as although they were unwanted conduct and had the effect of violating the claimant's dignity etc it is not satisfied that that was the purpose of the breaches and, in any event, that they were related to race;

29.3 victimisation as although the claimant did a protected act in raising his grievances and Dr Dwarakanath subjected him to detriment by breaching his confidence on three occasions, the Tribunal is not satisfied that those breaches were because the claimant had done any protected act.

30. The claimant asserted that some of the incidents that formed the basis of the disciplinary investigation were not reported in accordance with the respondent's incident reporting policy in that they were reported directly to Ms Dean who sent them directly to the HR manager and Ms M. Four incidents are relied upon as set out below. The Tribunal first makes two general findings, however: first, it accepts the evidence of Dr Dwarakanath and others that there is no absolute

requirement that the Datix procedure should be used to report incidents; secondly, it is perfectly proper for a manager to bring appropriate employee-related matters to the attention of HR colleagues.

a. On 13 September 2018, Ms Dean spoke to the Emergency Theatre Team Leader to follow up on his comment that the claimant had "left a right mess" the previous day. He then wrote to Ms Dean on 20 September and Ms Dean forwarded that email to Ms M. The Tribunal is satisfied that there is nothing out of the ordinary in respect of these exchanges which fall within each of the two general findings set out above.

b. On 18 September 2018, Mr Bhaskar wrote to Mr Agarwal (copy to Ms Dean) to the effect that being on call with the claimant was stressful. He gave two examples the second of which was that on 3 September 2018 an absence of communication from the claimant had caused him to adjust his plans regarding surgery that he was about to undertake. Although the Tribunal has found in favour of the claimant with regard to the substance of this issue the question at this stage is whether writing to Mr Agarwal was a breach of the incident reporting policy. The Tribunal is not satisfied that it was and, once more, considers that this email falls within each of the two general findings set out above.

c. The first of the two examples given by Mr Bhaskar in his email of 18 September related to the claimant handing over a patient to Mr Shanmugam without communicating with Mr Bhaskar. Once more the Tribunal has accepted the claimant's evidence in this respect but it is again satisfied, as above, that this email from Mr Bhaskar falls within each of the two general findings set out above.

d. On 12 October 2018 the claimant refused to operate on patients due to his concern that they were emergencies and he had been barred from undertaking such work. This was communicated to Mr Agarwal by theatre staff. There was then an exchange of email correspondence between the claimant and Mr Agarwal who forwarded the claimant's email to Ms Dean and she, in turn, to HR and Prof M. In relation to the incident itself the Tribunal has found that the claimant was not acting unreasonably in seeking clarity but, as with the above three matters it is not satisfied that there was any breach of the respondent's incident reporting policy and, once more, considers that this correspondence falls within each of the two general findings set out above.

31. In summary, each of the above matters was reported outside the Datix process but the Tribunal is satisfied that that was with good cause. The claimant relies upon the above breaches of the incident reporting policy in relation to his complaints of direct race discrimination, harassment and victimisation but, for the reasons set out above, the Tribunal is not satisfied that any of the above issues amounted to breaches of that policy and, therefore, the claimant's

complaints of direct race discrimination, harassment and victimisation in these respects are not well-founded.

32. The claimant relied upon four breaches of the Disciplinary Policy in respect of which the decisions of the Tribunal are as follows:

    a. The claimant has not particularised the "issues of concern about him" to which he refers in this issue. The Tribunal assumes that he is referring to what might have been discussed with him had the meeting between him, Mr Agarwal and Ms Dean **(**originally proposed for 14 September 2018) gone ahead.

       The Tribunal has found above that in relation to the initiation of the disciplinary investigation on 21 September 2018 the claimant has discharged the burden of proof upon him to establish a prima facie case of direct race discrimination and that the respondent has failed to discharge the burden upon it to demonstrate that it was in no sense whatsoever because of race. An aspect of that finding is that the allegations could have been dealt with informally but were not.

       The question for the Tribunal at this stage is subtly different being whether there was a breach of the respondent's disciplinary policy. That policy provides that there should be informal discussions before formal action is taken except where informal resolution is not appropriate. In the circumstances more fully particularised above, the Tribunal is satisfied that it was appropriate to address the allegations by way of informal resolution. Indeed the respondent's witnesses confirmed that informal resolution would have been appropriate but maintained that the claimant refused to meet Mr Agarwal and Ms Dean, which the Tribunal has found was not the case. Thus the Tribunal is satisfied that there was a breach of this policy.

       The claimant relies upon that breach in relation to his complaints of direct race discrimination, harassment and victimisation.

       The Tribunal has found above that initiating a disciplinary investigation into the claimant's conduct on 21 September 2018 did amount to direct race discrimination, and an aspect of that was the respondent's failure to follow its disciplinary procedure that wherever possible there should be informal discussions before formal action is taken.

       As to the complaint of harassment, for similar reasons, the Tribunal is satisfied that this failure did amount to unwanted conduct, was related to race and did have at least the effect of violating the claimant dignity etc; particularly creating an intimidating and hostile environment for him.

In the circumstances, the Tribunal is satisfied that in respect of that breach of this policy the claimant has established a prima facie case of both direct race discrimination and harassment, which for the reasons set out above the respondent has failed to demonstrate was in no sense whatsoever because of or related to race.

The Tribunal is not so satisfied, however, in relation to the complaint of victimisation as although the claimant was subjected to this detriment the Tribunal is not satisfied that this was because he had done a protected act.

b. The respondent did not keep notes or informal records of meetings including those referred to in this issue. In this regard the Tribunal accepts the submissions made by Ms Levene that none of the meetings were formal disciplinary meetings such that paragraph 6.16 of the policy applies ("A formal record be made of all meetings held in accordance policy, which includes the investigation, hearing and the appeal stage"); further, that notes cannot realistically be taken of every discussion. In addition, the Tribunal found Ms Lynch to be a good witness and accepted her evidence in these respects. For these reasons the Tribunal is not satisfied that the respondent was in breach of this policy in these respects. That being so it does not find to be well-founded the claimant's complaints that failing to keep/create a formal record of meetings held under this policy constituted acts of direct discrimination, harassment or victimisation.

c. Clearly the disciplinary investigation took longer than the four weeks referred to at paragraph 6.22 of the disciplinary policy but in the experience of this Tribunal that would not be unusual for a complex investigation such as this in the course of which many individuals were interviewed. That said, this investigation lasted some 74 weeks; so long, in fact, that it is difficult not to find that this was not only a breach of good industrial relations practice but constituted a breach of the respondent own policy. The Tribunal so finds.

The claimant also relies upon that breach in relation to his complaints of direct race discrimination, harassment and victimisation. In this regard the Tribunal is satisfied that in respect of that breach the claimant has again established a prima facie case of both direct race discrimination and harassment (the length of time during which the claimant was having to work with the pressure of a disciplinary investigation hanging over him at least having the effect of creating an intimidating and hostile environment for him), which the respondent has failed to demonstrate was in no sense whatsoever because of or related to race. Once more, however, the Tribunal is not so satisfied in relation to the complaint of victimisation as although the claimant

was subjected to this detriment the Tribunal is not satisfied that this was because he had done a protected act.

d. The Tribunal does not find that the respondent can be criticised for having interviewed too many members of its staff in the course of seeking to ensure a thorough investigation. For these reasons the Tribunal is not satisfied that the respondent was in breach of this policy in this respect. That being so it does not find to be well-founded the claimant's complaint that unnecessarily interviewing a large number of staff who are not involved in the allegation constituted acts of direct discrimination, harassment or victimisation.

33. The claimant has also relied upon a breach of the respondent's Grievance Policy in that "disciplinary action should have been taken against Mr Agarwal (with the support of Mr Bhaskar and Mr Shanmugam)". The Tribunal is satisfied, however, that the respondent had no evidence or even sufficiently well-founded allegations against Mr Agarwal that he had victimised or retaliated "against another employee for alleging harassment and/or against an employee who makes malicious or vexatious allegations of harassment". For these reasons the Tribunal is not satisfied that the respondent was in breach of this policy in this respect. That being so, the Tribunal does not find to be well-founded the claimant's complaint that not taking disciplinary action against Mr Agarwal (or indeed Mr Bhaskar or Mr Shanmugam) constituted acts of direct discrimination, harassment or victimisation.

Breaches of confidentiality

34. The claimant has relied upon five alleged breaches of confidentiality all of which have been addressed above. In summary, and by reference to the numbering in the agreed list of issues, the Tribunal has found above as follows:

1. Dr Dwarakanath did breach the claimant's confidentiality in the meeting with consultants on 11 May 2018.

2. Dr Dwarakanath also breached the claimant's confidentiality in his letter of 25 June 2018.

3. Including the feedback from Dr Dwarakanath on the Datix w95087 on 12 October 2018 was a breach of the claimant's confidentiality.

4. The claimant's allegations in his second grievance of 10 May 2019 relating to what he regarded as being inappropriate behaviour by senior consultants and a serious breach of confidentiality were not well-founded.

5. The claimant's complaint relating to the alleged breach of confidentiality when, on 6 June 2019, a witness statement of one employee was sent to another was withdrawn by the claimant.

35. Notwithstanding that there were the breaches referred to at points 1, 2 and 3 above, the Tribunal is not satisfied that any of those breaches constituted acts of direct race discrimination, harassment or victimisation as asserted by the claimant.

Unauthorised deduction from wages – section 13 of the 1996 Act

36. The claimant has relied upon two matters under this head of claim. First, in his email of 29 September 2018 he raised that he had been underpaid the salary due to him because, in accordance with the respondent's policy, he was entitled to 0.25 session per annum for doing appraisals. The claimant raised this issue again when he met Ms Dean on 26 November 2018 to resume the job plan discussions. As set out above, the Tribunal has accepted Ms Dean's explanation as to why the claimant was incorrect in this assertion given that his job plan calculation included the appraiser role.

37. That being so, the Tribunal finds that the claimant's complaint that the respondent made an unauthorised deduction from his wages in this regard is not well-founded.

38. The second matter is that the claimant considered that he had not received the additional 1 PA on a consultant salary, which he maintained he should have received for having undertaken the locum consultant role from March 2015 to September 2017. The claimant had also raised this issue at the above meeting the Ms Dean on 26 November 2018, although in answering questions the claimant suggested that he had first raised this with Ms Dean in 2017. As set out above, the letter of 29 May 2015 confirming the claimant's appointment to the locum consultant position clearly stated that he would, "receive 15.5 PAs on your current salary of £[*x*]pa as an Associate Specialist and an additional 1 PA on a consultant salary of £[*y*]". This being so, the Tribunal does not accept Ms Levene's submission that the 15.5 PAs, "included an additional one PA to take into account the emergency on-call aspect of the Locum Consultant role." On the contrary the Tribunal is satisfied that the letter of 29 May 2015 clearly refers to the claimant receiving 15.5 PAs and an additional 1 PA; thus any possible confusion as to whether the word "and" is conjunctive or disjunctive is removed by the use of the word "additional". As such, the claimant would appear to have had grounds for advancing his claim; whether he can do so is addressed in the following section of these Reasons.

Time limits

39. The Tribunal acknowledges that as the issue of whether claims are presented within the time periods prescribed in the relevant legislation is a matter of jurisdiction it might well have addressed this issue earlier in these Reasons. It has considered, however, that while that might have been appropriate had there been a strict, inflexible time limit the contrary is the case and questions of whether conduct extends over a period or is part of a series of similar acts, and whether it is just and equitable to extend time or it was not reasonably practicable for a complaint to have been presented in time can only be assessed satisfactorily in light of the totality of the evidence.

40. In relation to the claims that the claimant has advanced under the 2010 Act, section 123(1) of that Act provides that, as a general rule, a complaint must be presented to the employment tribunal within the period of three months starting with the date of the act to which the complaint relates but that the Tribunal has discretion to extend that initial period to become such other period as it thinks just and equitable. Additionally, it is provided in section 123(3) of that Act that conduct extending over a period is to be treated as done at the end of the period.

41. Guidance on this latter point was provided in Barclays Bank plc v Kapur [1991] ICR 208 where the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. The Court of Appeal in Hendricks v Metropolitan police Commissioner [2002] EWCA Civ 1686 subsequently clarified that a tribunal should not focus too much on the concepts of policy, rule, scheme, regime or practice but upon the substance of the claimant's allegation that the employer was responsible for an ongoing situation or a continuing state of affairs in which employees were treated less favourably. Thus, the question was whether there was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. This decision was cited with approval in Aziz v FDA [2010] EWCA Civ 304 where the Court of Appeal noted that in considering whether separate incidents formed part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents"; the Tribunal considers that to be of some relevance in this case. In this connection the Tribunal also had regard to the guidance it draws from the decision in Cast v Croydon College [1998] EWCA Civ 498.

42. Additionally, in Hale v Brighton and Sussex University Hospitals NHS Trust [2017] UKEAT 0342 the EAT held, "The Tribunal erred in treating the decision to instigate disciplinary procedures as a one-off act when that decision created an ongoing state of affairs to which the Claimant was subject." Choudhury J explained,

> "That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision."

There are clear parallels to be drawn between the facts in Hale and those in the case before this Tribunal and the above decision and reasoning is applied below.

43. The claims that the claimant has advanced under the 1996 Act must also, as a general rule, be presented to the employment tribunal within a period of three months,

    43.1 in the case of the unauthorised deductions claim,

        43.1.1 beginning with the date of the payment of the wages from which the deduction was made, but
        43.1.2 if the Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the period of three months it may consider the complaint if it is presented within such further period as the Tribunal considers reasonable (section 23);

    43.2 in the case of the public interest disclosure claim,

        43.2.1 beginning with the date of the act or the failure to act or where the act or failure is part of a series of similar acts or failures the last of them, or
        43.2.2 within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (section 48).

44. In the context of the above statutory framework the Tribunal first sets out some introductory remarks in relation to this issue. On the basis of the primary findings of fact that the Tribunal had made above it draws certain inferences (again, applying the decision in Jhuti, focusing upon the mental processes of the individuals involved) as follows:

    44.1 The primary motivation of a number of senior employees of the respondent in respect of certain of the steps taken with regard to the claimant was to acknowledge and respect the position taken by Mr Shanmugam and Mr Bhaskar that they did not wish to work with the claimant on the emergency on-call rota, in which they were supported by Mr Agarwal and Dr Dwarakanath.

    44.2 The means to achieve that objective was to change the claimant's job plan.

    44.3 That process became fraught due to it not being possible to arrange a meeting between Mr Agarwal, Ms Dean and the claimant around 14 September 2018, and was delayed on account of processes arising from the claimant's grievances and appeal and job plan mediation and appeal.

    44.4 Nevertheless, it was expected by Ms Dean that the job plan process would have concluded in early September 2018. Hence, she drafted the letter that she sent to HR for checking on 31 August 2018 only to be told that the claimant was entitled to appeal. That led to the rapid and urgent exchange of emails on 4 September 2018, and to some

other means being necessary to achieve the objective of removing the claimant from the emergency on-call rota. That alternative had two aspects: first, the disciplinary investigation and, secondly, the removal of the claimant from the emergency on-call work both of which occurred on 21 September 2018.

44.5 Those two processes were inextricably linked as is graphically shown by diagram No 2 attached to the claimant's written submissions.

44.6 The claimant's suspension from on-call duties continued until, when the job plan process concluded with the claimant having to accept the new job plan and therefore not undertaking any on-call work, the disciplinary process in turn concluded with, effectively, no further action being taken against the claimant in respect of any of the eight allegations.

45. The Tribunal is satisfied that this was conduct extending over a period as provided for in section 123(3) of the 2010 Act as explained in Hendricks and in respect of which the Tribunal repeats that, in accordance with Aziz, the fact that largely the same individuals were involved in those incidents is a relevant factor. In this respect the Tribunal brings into account the number of meetings etc in the parallel processes that kept revisiting these issues, which resulted in the same conduct on behalf of the respondent being repeated or restated. The end of the processes, and therefore the conduct, is actually after the presentation of the claimant's claim form on 15 April 2019. A more specific example out of the many found above was the letter dated 13 December 2018 from Dr Dwarakanath threatening disciplinary action against the claimant.

46. Considering the evidence before it in the round, the Tribunal is satisfied that, as was found in Hale, the decision to instigate disciplinary procedures "created an ongoing state of affairs to which the Claimant was subject."

47. In short, for the above reasons the Tribunal is satisfied that the claimant's experiences amounted to an ongoing situation or a continuing state of affairs. An important question, of course, is when that ongoing situation or a continuing state of affairs began as, even if incidents of less favourable treatment, harassment or victimisation occurred during the course of the claimant's employment they will not be 'in time' under the "extending over a period" provision in section 123(3)(a) of the 2010 Act if they arose prior to the commencement of that period.

48. As set out above, the Tribunal is satisfied that the a number of senior employees were motivated to take steps in relation to the claimant by Mr Shanmugam and Mr Bhaskar not wishing to work with the claimant on the emergency on-call rota, in which they were supported by Mr Agarwal and Dr Dwarakanath, and that at least the initial means to achieve that was to change the claimant's job plan. It is difficult to be absolutely precise as to when that motivation arose but the Tribunal is satisfied that it is likely to have arisen in April 2018 when, after the consultants' meeting Mr Agarwal told a number of them of the concerns that had been raised about their practice and in so doing revealed the identity of the

claimant, and, in any event, that it was definitely in play when on 6 June 2018 Mr Shanmugam submitted Datix w95087 and Mr Bhaskar submitted Datix w95107, which they each followed up, respectively, in their emails on 9 August and 18 September 2018 in which each of them referred to not wishing to undertake on-call work with the claimant.

49. On this basis, therefore, the Tribunal is satisfied as follows:

    49.1 in respect of the claimant's claims under the 2010 Act the matters of which he has complained to this Tribunal during the period commencing 6 June 2018 and ending on the date upon which he presented his claim to the Tribunal (16 July 2019) amounted to conduct extending over a period which therefore falls to be treated as done at the end of the period, and

    49.2 in respect of the protected disclosure claim under the 1996 Act there were, during that same period, acts or failures to act that were part of a series of similar acts and, therefore, time runs from the last of them.

50. That being so, the claims referred to in the immediately preceding paragraph in relation to the matters occurring during the period 6 June 2018 to 16 July 2019 are 'in time'.

51. If the decision of the Tribunal in respect of the above had been to the contrary, the Tribunal would have gone on to consider whether, in relation to the claims under the 2010 Act, it would be just and equitable to extend time to allow the claimant to bring those claims. The Tribunal considered this question for completeness but for obvious reasons sets out that consideration only briefly in these Reasons.

52. Guidance in this respect is given in the decision of the EAT in British Coal Corporation v Keeble [1997] IRLR 336. In considering the relative prejudice that each party would suffer if such an extension were to be granted, relevant considerations include the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected, the promptness with which the claimant acted once he knew of the facts giving rise to the claim and the steps he took to obtain appropriate advice. It has been said that these considerations are not rules as such but constitute a "valuable reminder" of what might be brought into account. This Tribunal considers the most important to be the extent to which quality of evidence is impaired by the passage of time. In this case there has been no suggestion that the quality of evidence has been so impaired; on the contrary, each of the claimant's complaints and assertions has been clearly and thoroughly addressed on behalf of the respondent.

53. Although the Tribunal has a wide discretion in determining this question it is nevertheless for the claimant to satisfy it that it is just and equitable to extend time: see Robertson v Bexley Community Centre [2003] IRLR 434, CA. In light of the findings made above, had it been necessary for the Tribunal to consider this question it would have been satisfied, in relation to the claims under the 2010 Act, that it would be just and equitable to extend time to allow the claimant

to bring those claims that relate to the matters occurring during the period 6 June 2018 to 16 July 2019.

54. That said, in light of the guidance that it draws from case precedents such as Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA, the Tribunal would not have been similarly satisfied that it was not reasonably practicable for the claimant to have presented the protected disclosure claims in time.

55. For the avoidance of doubt the Tribunal records that in light of our findings in relation to issue k. of the complaint of harassment it seems possible that the Tribunal would have found that complaint to have been well-founded but given that the circumstances related to the M&M meeting on 28 July 2017, that complaint was presented 'out of time' such that the Tribunal does not have jurisdiction to consider it.

56. That leaves the claims of unauthorised deduction from wages. The Tribunal has found that the first of those claims, that the claimant was entitled to 0.25 session per annum for doing appraisals, is not well-founded. The Tribunal has, however, expressed itself to be satisfied that the claimant would appear to have had grounds for advancing his claim in respect of an additional 1 PA on a consultant salary. The last payment that he received in that respect, however, was in September 2017. As such, that claim is well beyond the normal three-month time limit and (again by reference to case law such as Palmer and Saunders, the Tribunal is satisfied that it was reasonably practicable for the claimant to have presented that claim in time. As such, this Tribunal is precluded from considering it further.

Conclusion

57. The unanimous judgment of the Employment Tribunal is as follows:

57.1 The claimant's complaints that the respondent directly discriminated against him on grounds of race contrary to sections 13 and 39 of the 2010 Act

57.1.1 are well-founded in respect of the matters referred to in issues o. p. and q. relating to the complaint of direct discrimination above, and

57.1.2 are well-founded in respect of issues a. and c. relating to the breach of the disciplinary policy, but

57.1.3 are not well-founded in respect of the matters referred to in the other issues relating to the complaint of direct discrimination above and those complaints are dismissed.

57.2 The claimant's complaints that the respondent harassed him contrary to sections 26 and 40 of the 2010 Act

57.2.1 are well-founded in respect of the matter referred to in issue k. relating to the complaint of harassment above, and

57.2.2 are well-founded in respect of issues a. and c. relating to the breach of the disciplinary policy, but

57.2.3 are not well-founded in respect of the matters referred to in the other issues relating to the complaint of harassment above and those complaints are dismissed.

57.3 The claimant's complaints that the respondent victimised him contrary to sections 27 and 39 of the 2010 Act are not well-founded and are dismissed.

57.4 The claimant's complaints that the respondent subjected him to detriments on the ground that he had made a protected disclosure contrary to section 47B of the 1996 Act

57.4.1 are well-founded in respect of the matters referred to at issues a, b, c, d, f, g and i. relating to the complaint of detriment above, but

57.4.2 are not well-founded in respect of the matters referred to at issues f. and h. relating to the complaint of detriment above and those complaints are dismissed.

57.5 The claimant's complaints that the respondent made an unauthorised deduction from his wages contrary to section 13 of the Employment Rights Act 1996 are not well-founded and are dismissed.

58. This case will now be listed for a private preliminary hearing to last half a day at which consideration will be given to the issues to be addressed at a future remedy hearing in relation to those of the claimant's complaints in respect of which he has been successful as set out above and an appropriate case management orders will be made. If either of the parties considers that this time estimate of half a day is too short the Tribunal must be informed of that immediately. Subject to any representations that might be made by all on behalf of the parties the preliminary hearing will be conducted by way of the Cloud Video Platform.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 17 January 2021