EMPLOYMENT TRIBUNALS

Claimants: Mr Gregory Kalu & Dr Onome Ogueh

Respondent: Brighton and Sussex University Hospitals NHS Trust

Heard at: London South by CVP **On: 30 November, 1, 2, 3, 7, 8, 9 and 10 December (and in chambers 11, 14, 15 December 2020 & 15 February 2021)**

Before: Employment Judge Khalil sitting with members
Ms J Jerram
Mr P Adkins

Appearances

For the claimant: Mr Elesinnla, Counsel
For the respondent: Mr Kibling, Counsel

RESERVED JUDGMENT

UNANIMOUS DECISION:

- The claimants' claims of direct discrimination under S.13 Equality Act 2010 are not well founded and are dismissed.

- The claimants' claims of victimisation (race) under S.27 Equality Act 2010 are not well founded and are dismissed.

- The claimants' claims of protected disclosure detriment under S.47B Employment Rights Act 1996 are not well founded and are dismissed.

- The claimants' claims of unfair dismissal (protected disclosure) under S.103A Employment Rights Act 1996 are not well founded and are dismissed.

- The claimants' claims of unfair dismissal under S.94/98 Employment Rights Act 1996 are well founded and succeed. However the Tribunal assessed a ***Polkey*** chance of dismissal notwithstanding as 100%. Additionally/alternatively the compensatory award and basic awards are were reduced to nil/a 100% reduction pursuant to sections 122 (2) and 123 (6) of the Employment Rights Act 1996.

- The claimants' claims of wrongful dismissal are not well founded and are dismissed.

Reasons

Claims, appearances, documents.

(1) This was a claim for direct race discrimination, victimisation (race), detriment for making protected disclosures, unfair dismissal for making protected disclosures, ordinary unfair dismissal and wrongful dismissal.

(2) The claimants were represented by Mr Elesinnla, Counsel; the respondent was represented by Mr Kibling, Counsel.

(3) The Tribunal heard from the claimants who had produced witness statements. For the respondent, the Tribunal heard from Mr Matthew Kershaw, former Chief Executive, Dr George Findlay, Chief Medical Officer (and Medical Diretor) and Deputy Chief Executive, Mr Michael Viggers, former Chair of Western and the Trust, Mr Marco Maccario, Consultant Cardiac Anaesthetist, Mr Martin Sinclair, Non-Executive Director, Mr Paul Carter, (Western) Consultant Urological Surgeon, Ms Marianne Griffiths, Chief Executive Officer (Western) and Ms Denise Farmer, Chief Officer for Organisational Development. All of the respondent's witnesses had produced witness statements too.

(4) The Tribunal were provided with an agreed electronic bundle running to 2489 pages. There was an application on day 1 of the hearing to admit additional documents. Following submissions, the Tribunal permitted late admission because the documents were considered actually or potentially relevant to the issues the Tribunal would need to determine. The prejudice to the respondent was either minimal or manageable.

(5) The Tribunal also considered an application to amend the list of issues by the claimant to rely on additional protected acts/protected disclosures. The application was opposed. This was refused, having regard to the principles in the Employment Tribunal Presidential Guidance and the ***Selkent Bus*** principles to determine the balance of prejudice (nature of the amendment, timing of the application and time limits). The Tribunal announced that it would proceed on the basis of the list of issues provided by the respondent on 28 July 2020 in response to an originating list from the claimant which had not since been challenged save in the days leading up to the application on day one. The claimants were permitted to address the Tribunal in submissions on the additional narrative inserted in the description of the list of issues in so far as these added necessary clarity based on the pleaded claims. (These submissions were not in the end forthcoming).

(6) The claimants also withdrew the allegation of direct race discrimination in relation to the report of Ms Hill QC. The allegations of victimisation and protected disclosure detriment in relation to this report were not withdrawn.

Those allegations were subject to a deposit Order made by Judge Webster on 23 February 2018.

(7) Following the Tribunal's reading day on Tuesday 1 December, the Tribunal discussed a few preliminary matters with the parties before commencing the evidence on Wednesday 2 December 2020:

- CVP instructions/housekeeping

- Whether Mr Kibling intended to cross examine both claimants with the same questions (because of the substantial overlap of their cases)

- The Tribunal's observation that the Henrietta Hill QC investigation report ('HHIR') had received judicial consideration in litigation involving Dr Lyfar-Cisse and the respondent (case no 2302458/15 heard in May/June 2017) at a preliminary Hearing, a full merits Hearing and at an EAT appeal, in which Hearings the HHIR was not found to be discriminatory (race) or victimisation (race). In these proceedings, there had also been cross reference to the same report during the respondent's application to strike out the detriment claims or for a deposit Order in the alternative (race, victimisation and protected disclosure). The claim was not struck out but a deposit Order was made. The Tribunal questioned to what extent the Tribunal was being asked to revisit that report for the purposes of the claims in these proceedings. This was unanimously considered to be a legitimate, proportionate enquiry with the overriding interest in mind. Mr Elesinnla submitted that the previous Judicial findings were of no relevance at all. Mr Kibling submitted that the Tribunal was bound by those findings. Given the polarised views, the Tribunal's provisional enquiry was complete at this point and its decision reserved for deliberations.

- The last preliminary matter raised was the Tribunal expressing its view that it would not be reaching any findings on alleged detriment (s) beyond those alleged to be causally linked to the four protected acts/protected disclosures in the list of issues discussed on the first day. Thus, no evidence was necessary on anything beyond that. This query was triggered by references the Tribunal had seen during its reading to previous Employment Tribunal Litigation (discrimination) between the claimants and the Trust. The response from Mr Elesinnla to this expression of view was to refer, for the first time, to the claimant's reply to a request for further and better particulars, setting out 21 protected acts (in total). Allowing for the 4 'agreed' protected acts/protected disclosures, this was a further 17. This had not been raised at all on day one when the Tribunal spent a large amount of time sorting out the issues and dealing with an application to amend the list from the claimant. The Tribunal was alarmed by this conduct, it was particularly concerning that this was being raised after an application to amend the list of issues had already been made on day one by Mr Elesinnla who had been representing the claimants for some considerable time. The

Tribunal made its displeasure known given the loss in valuable Tribunal Hearing time.

(8) Following deliberations, the Tribunal permitted the additional list of protected acts/protected disclosures on condition that and subject to an Order that a statement was provided to the respondent and the Tribunal setting out what the alleged protected act/protected disclosures were (as many were not clear – the Tribunal illustrated this with a few examples (a) & (u) (on the document produced) and to set out the alleged detriments which flowed. Following discussion with the parties it was agreed to push back the start time of the evidence to 2.00pm for this list to be produced by the claimants. Mr Kibling was given leave to address the Tribunal on any alleged prejudice (beyond his provisional observations) upon receipt of the document and once he had taken instructions.

(9) The list when provided did not comply with this Order. There remained several unparticularised protected disclosures/protected acts and inadequate clarity about which detriments flowed from which disclosures/acts. The list of issues was thus not amended any further (though see below for the Tribunal's conclusions on the generality of previous discrimination Tribunal claims).

(10) On day four of the hearing the respondent was permitted to rely on one additional issue in relation to whether the right to be accompanied grievance was raised in good faith. Given the latitude extended to the claimant to date (in respect of which Mr Elesinnla had stated the Tribunal had been very even-handed), this was permitted. The claimant raised that the issue regarding the delay in the disciplinary investigation was not in fact an issue in the case. This had not been raised before and was only raised during the cross examination of Mr Kalu on this issue. The Tribunal also confirmed that Mr Kibling's question put to Mr Kalu that the 27 July alleged protected act was false and not made in good faith was not permitted as it was not part of the respondent's pleaded case. However, this was subject to the Tribunal needing to be satisfied itself that S.27 Equality Act 2010 and section 43B Employment Rights Act 1996 were satisfied in relation to the requisite definitions for protected act and protected disclosure being met.

Relevant Findings of fact

(11) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

(12) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

(13) The claimants were employed by the respondent NHS Trust as Consultant obstetrician and gynaecologists.

(14) Mr Kalu's commenced employment on 5 February 2002 and Mr Ogueh commenced employment on 1 January 2001.

(15) The claimants are members of the Black Minority Ethnic ('BME') network.

(16) The claimants had previously brought proceedings against the Trust and named individuals for race discrimination in 2008, 2010, 2011 and 2012. The eventual outcome of those proceedings were not disputed; the proceedings were unsuccessful. The fact of those proceedings was relevant as it emerged that the claimants placed reliance on them as protected acts for the purpose of their victimisation claims in these proceedings.

(17) The management of the respondent Trust changed in April 2017, when management responsibility was assumed by Western Sussex Hospitals NHS Foundation Trust.

(18) On 28 January 2014, Ms Burns, Change Consultant, Delivery Unit, an employee of the trust, attended a BME event. The BME was chaired by Dr Lyfar-Cisse. Ms Burns is white, American/Irish.

(19) Following her attendance at this event, Ms Burns raised a grievance on 4 February 2014 under the dignity at work ('DAW') procedure about remarks and/or conduct at that meeting which she said was related to (her) sexual orientation (Ms Burns is of lesbian sexual orientation) (pages 467-470). In summary only, she believed that Dr Lyfar-Cisse had outed her sexual orientation. She believed Dr Lyfar-Cisse was being homophobic. She referred to a previous occasion when Dr Lyfar-Cisse had expressed her disapproval of gay marriage.

(20) On 10 April 2014, Ms Burns lodged a further grievance against Dr Lyfar-Cisse that she had breached confidentiality by speaking publicly about the earlier grievance that had been raised against her at the BME conference on 4 April 2014 (1172).

(21) An external consultant, Mr Colin Hann, was appointed to undertake the grievance investigation involving both grievances. It was a matter of dispute between the parties if Mr Hann was instructed with the agreement of both Dr Lyfar-Cisse and Ms Burns as asserted by the claimant or if there were no such agreement. The Tribunal found that there was no agreement. There was no testimony heard from Dr Lyfar-Cisse or Ms Burns, the Tribunal considered it unusual for grievance hearers to require to/be agreed by complainants and the respondent's grievance procedure did not envisage such a step for individual grievances.

(22) The investigation took place under the respondent's dignity at work policy. A meeting with Dr Lyfar-Cisse took place on 29 July 2014. Mr Kalu accompanied

Dr Lyfar-Cisse. At this meeting, Dr Kalu said to Mr Hann that if action was not taken against Ms Burns about her remarks about the BME network members, he would be forced to take action. He stated that her conduct could not go unpunished.

(23) Mr Hann's subsequent report dated 2 October 2014 (1507) did not uphold Ms Burns' complaint of discrimination but was critical of Dr Lyfar-Cisse in several respects. It emerged and he found, that prior to the BME network meeting on 28 January 2014, Dr Lyfar-Cisse had reacted adversely to Ms Burn's wish to have more BME members present on the Values, Vision and Behaviours ('VVB') project. Dr Lyfar-Cisse felt she had been undermined about this as she had reservations about the leadership of VVB. She considered Ms Burns to be "reprehensible, unduly provocative and vexatious".

(24) On 19 October 2014, Ms Burns submitted an appeal against the outcome of Mr Hann's report. Within that appeal she commented on the trust having only conducted 2 interviews in 8 months and to an 'abysmal' track record in keeping to deadlines (1561).

(25) On 13 November 2014, Ms Burns lodged a further grievance under the DAW procedure against Dr Lyfar-Cisse alleging that she had sent an email on 12 August 2014 (which had not been considered/dealt with by Mr Hann) in which she was alleged to have made known the fact of Ms Burns' grievance (and had offered to share it) and an Employment Tribunal claim to the 600+ BME network members (1173).

(26) Ms Burns' appeal against Mr Hann's report was heard by Mr Dominic Ford, Director of Corporate, on 4 December 2014. Ms Burns was accompanied by her union representative and her partner (1593).

(27) On 22 December 2014, Dr Lyfar-Cisse appealed against the outcome of Mr Hann's report (486). In this letter, Dr Lyfar-Cisse also stated "The Members will also be submitting their collective grievance against Ms Burns in due course"

(28) On 23 December 2014, Dr Lyfar-Cisse also submitted a grievance against Ms Burns.

(29) On 12 January 2015, a collective grievance was raised against Ms Burns by 8 BME network members (pages 510). This included both claimants. The complaint, in summary, was about Ms Burns' comments (in her grievance against Dr Lyfar Cisse) about the BME members being referred to as 'strangers' and being stereotypically assumed to be homophobic or to treat her in isolation as a result and about being subject to and under the control of Dr Lyfar-Cisse. This email was relied upon as a protected act and a protected disclosure. The Tribunal found the context of the grievance was not, reasonably, about race discrimination. There was no express allegation of race discrimination. The objection was to the BME members being stereotypically insinuated as being homophobic based on Ms Burns' view that her sexual orientation had been outed amongst a group of strangers. This was not, in the Tribunal's view, an

opinion (of Ms Burns' grievance) that could reasonably be inferred. Her grievance had nothing to do with race on any reasonable interpretation.

(30) On 19 January 2015, Mr Ford wrote to Dr Lyfar-Cisse indicating his provisional view that the findings in Mr Hann's report were unreliable and a fresh investigation ought to take place. He offered in the alternative to complete Dr Lyfar-Cisse's appeal and have a meeting with her (1641). The proposal to have a new investigation was declined by Dr Lyfar-Cisse. An appeal hearing was set for 27 February 2015. Mr Kalu was to accompany Dr Lyfar-Cisse.

(31) On 22 January 2015, Ms Burns lodged a further complaint seeking information/clarity about whether a grievance or appeal had been lodged by Dr Lyfar-Cisse against Mr Hann's report and that she had seen a copy of the collective grievance which she considered to be an act of victimisation.

(32) On 3 February 2015, Ms Burns also submitted a response to Dr Lyfar-Cisse's appeal against Mr Hann's outcome. Within that response she also referred to her belief that the collective grievance (of the claimants and others) was an act of bullying, harassment and victimisation (1659).

(33) On 4 February 2015, Mr Kershaw wrote to the claimants explaining that Mr Albert Rose had been appointed on a 3 months fixed term contract to support Trust Managers to deal with outstanding BME grievances and that he would be writing to them to progress the grievance. Mr Rose is black. However, subsequently, Mr Rose ceased to be involved in the investigation. The reason for that was disputed in these proceedings. The claimants alleged this was because the respondent had accepted/agreed to Ms Burns' request that a 'black' man did not undertake the process. The respondent asserted that the reason was because on 7 February 2015 (i.e. 3 days later), he had resigned from his position. There were no documents in the bundle to support that claim. The Tribunal considered it relevant to ask if any documentation existed to support the respondent's assertion. An email exchange was produced by the respondent dated (page 2270). This confirmed that Mr Rose had resigned and the exchange with HR did not provide a reason. Mr Kershaw's evidence was that he felt he was unable to take on this work. There was no evidence before the Tribunal at all to support any finding that Ms Burns had instigated this; or that this was because Mr Rose was black, or that the respondent had agreed to such a request. The Tribunal also considered that such a claim was not consistent with a resignation initiated by Mr Rose unless he had been 'told' or 'instructed' to resign which was not alleged. Mr Rose was not called to give evidence. The Tribunal found that the reason for Mr Rose's involvement ceasing was because he had resigned of his own volition. This was not an agreed issue in the case, neither was the assertion as advanced in evidence pleaded. The pleaded case was simply that Mr Rose, a black man, had been appointed. That was expanded in the narrative to issue 2 to the extent that Mr Rose's removal was on racial grounds. The Tribunal nevertheless determined the entirety of the allegation as set out herein.

(34) It was also asserted by the claimants that the allocation of Mr Rose was an agreement, which the respondent then reneged on. The Tribunal found there

was no agreement to the assignment of Mr Rose to support with the outstanding grievances. It was a unilateral decision of the respondent. This was clear from the evidence of Mr Kershaw and there was nothing in either the DAW or grievance policy about the need for the respondent to agree which employee of the respondent would support the investigation. As such, it was capable of being unilaterally changed.

(35) The hearing date of Dr Lyfar-Cisse's appeal had to be changed as she had objected to Mr Ford hearing her appeal. Mr William Stronach was appointed instead, Deputy Chief Financial officer. The appeal hearing took place on 27 March 2015. Before the outcome of the appeal hearing, Dr Lyfar-Cisse raised a grievance against Mr Ford, alleging race discrimination about the initial handling of her appeal. Mr Kershaw decided against sharing it with Mr Ford to avoid any possibility of his decision regarding Ms Burns' appeal being influenced – her appeal process was still outstanding.

(36) On 15 April 2015, Ms Burns submitted a grievance about the handling of her appeal against the outcome of Mr Hann's investigation by Ms Weatherill. Within this email, Ms Burns made reference to her third Tribunal claim (for victimisation). She also referred again to the email sent by Dr Lyfar -Cisse on 12 August 2014 to 600 or more people in relation to the claimant's grievance which she said had not been dealt with (and that Mr Hann had been told not to investigate it) (1194).

(37) The appeal outcomes of both Mr Ford and Mr Stronach were in terms that Mr Hann's investigation had been inadequate and was unreliable. These were both communicated on 1 May 2015 (1753 & 1760). Both outcomes also recommended conflating consideration of all subsequent linked grievances.

(38) It was against this background that Mr Kershaw made a decision to appoint Henrietta Hill QC to conduct a holistic investigation of all these grievances. His summary of all outstanding grievances was set out in paragraph 24 of his witness statement. There were 8 in total by this time. His summary was accepted by the claimants under cross examination.

(39) His reasons were set out in paragraph 26 of his witness statement. He explained there were by this time, multiple complaints from multiple individuals about each other and about the Trust, all the allegations were serious including against director level employees and the first investigation had not been good enough. He thus decided to appoint an external investigator with capacity and expertise. He believed going external was more likely to have objectivity too. Concurrently, he felt as the grievances all appeared interrelated, in the interests of time, cost and fairness they should all be considered as part of one investigation.

(40) In relation to the choice of external person, the Tribunal noted Mr Kershaw's objective for expertise and seniority. He felt a QC with discrimination law pedigree to fit that brief. He was also careful to ensure she had no previous knowledge of the parties in the case. She had never acted for or against the Trust and was unknown to the respondent's solicitors. The instruction to retain

counsel to undertake work, save where a barrister has a direct access scheme, is via solicitors. That is what happened in this case. The Tribunal was not taken to the instructions to counsel. There was an allegation made in evidence by Mr Kalu that he could not trust any instruction from the respondent's solicitor. This was said for the first time at that point. There was no allegation of discrimination or professional impropriety about the respondent's solicitors to date. It was rejected and considered to be a wild allegation made very late in the day. It was not part of the objection at the time.

(41) There was also a dispute in the case about which policy was the correct one to follow. The claimants said their grievance was a collective grievance and thus should have been dealt with under the respondent's grievance procedure which provided for collective grievances. The respondent's position was that all discrimination complaints were carved out of the grievance procedure to be dealt with under the DAW procedure. The Tribunal noted that all other grievances were individual grievances and none were collective. The Tribunal saw no practical difference to following one policy over the other. The decision made by the respondent was because of the subject matter. That was a reasonable view to take. The DAW had been followed in relation grievances of Ms Burns and Dr Lyfar-Cisse to date. The only comment expressed by the claimants regarding what difference it might have made was in paragraph 31 of Mr Kalu's witness statement wherein he stated that he would have the opportunity to have Ms Burns present at the grievance hearing. This was repeated under cross examination too. There was no policy or procedure reason which supported this assertion. The Tribunal found the reference to calling witnesses to a hearing in the grievance policy was not about calling a complainant, certainly not in the Tribunal's interpretation to be questioned by an alleged perpetrator. Nothing was advanced in evidence or in submissions to the contrary. There was nothing the Tribunal were taken to in relation to the assertion that the claimants could insist on/or be entitled to have Ms Burns present. The Tribunal found the decision to adopt the DAW policy universally for all of these grievances had a proper and legitimate basis.

(42) The Tribunal found that there was no prohibition in the DAW against the instruction of an external person to determine these grievances. (Neither was there any prohibition in the grievance policy, though the decision to appoint an external person (though not the person choice/identity) and the terms of reference should be agreed). In the light of the findings above however, this was not relevant.

(43) On 2 June 2015, the claimants were invited by Dr Farine Clarke, a non-executive director on the Board, who was overseeing the investigation, to meet with Ms Hill QC as part of the investigation (524-529). The letter enclosed the DAW, the terms of reference and Ms Hill QC's profile. The terms of reference referred to 9 outstanding grievances of the claimants, Ms Burns and Dr Lifar-Cisse to be considered.

(44) In an email dated 8 June 2015, the claimants declined the invitation to attend/participate in the investigation. They requested a stand-alone grievance, that Mr Chuka Udemezue should be appointed to investigate (who Mr Kalu

believed had been appointed by the Trust to deal with race related complaints) and that they be entitled to attend as a group.

(45) On 12 June 2015, Dr Clarke responded to the claimants and the other signatories to the collective grievance individually. She rejected individual consideration. She stated that the grievances were interrelated and considered them to be a series of complaints. Regarding Mr Udemezue, he was somebody who had been introduced to the Trust by Dr Lyfar-Cisse and thus he would not, in the interests of transparency be appropriate. Finally, she considered that the individuals should each meet personally with Ms Hill QC. The claimants were thus instructed to cooperate with the investigation and make themselves available for a meeting and subsequently on 18 and 22 June 2015.

(46) The Tribunal considered the reasons why Mr Kershaw and Dr Clarke decided to proceed in this way and found, emphatically, that there was nothing unreasonable, unfair or irregular about them. On the contrary, the Tribunal found it was completely appropriate to commission an external expert to deal with all matters at once. All parties would be judged through the same pair of eyes, with the entire context before that person. Further, Ms Hill was independent, with no prior knowledge of either party and not having previously instructed by the Trust. It was entirely open for the respondent to proceed in this way.

(47) On 26 June 2015, the claimants and the same signatories to the collective grievance of 12 January 2015, lodged a further grievance against the respondent. It referred to the alleged denial of a grievance hearing and cited institutional racism (555).

(48) On 2 July 2015, Mr Rufus George of the GMB submitted a complaint to the respondent on behalf, it appeared to the Tribunal, of the same collective group of eight (556). It referred to the alleged denial of a right for the grievance to be heard, that the intention of the Trust was to determine the complaint of a white employee about whether the BME network was homophobic and lacking in integrity and thought and questioned why a legal officer had been appointed to conduct the investigation. This was asserted to be institutional racism and discrimination. By way of resolution, the grievance proposed that the grievance was instead heard by someone who inspired confidence; that the current investigation was abandoned; that there were senior level discussions between the Trust, GMB and the BME network to repair relations.

(49) The Tribunal found the basis of the GMB grievance to be either ill-informed or otherwise unreasonable, particularly as the terms of reference for Ms Hill QC were unambiguously clear and cited the need to investigate 9 outstanding grievances. The choice of policy, the Tribunal has already found, was not improper. The suggestion to have senior level dialogue was about a broad, rather than specific engagement about the outstanding grievances which required resolution. The Tribunal found that this grievance was sent solely to halt the Ms Hill QC grievance investigation process.

(50) On 27 July 2015 (1964) Mr George sent a further email on behalf, it appeared to the Tribunal, of the same collective group of eight. In this email Mr George (in summary):

a) said the claimants were being denied their statutory grievance
b) said the grievance was not being treated as a collective
c) rejected the assertion that the Trust had initiated a procedure to look at a number of complaints
d) stated that a legal officer had been employed to conduct an investigation in to whether the negative generalisations against a group of BME members can be upheld and that was the intended scope of the investigation and the premise of the investigation suggests the Trust endorses that view
e) said the collective grievance had only been considered subsequently
f) considered the foregoing to amount to harassment or victimisation
g) said Dr Clarke had asked for a list of all BME network members so they could be 'interrogated'
h) noted the 'directive' to take part
i) said the scope of the investigation had not been mentioned.

(51) The Tribunal found that there many aspects of Mr George's email of 27 July 2015 which were not accurate. Matters (c), (d), (e) and (i) were not factually accurate in the light of the invitation letter to take part in the investigation dated 2 June 2015 which had attached the terms of reference. In relation to (g), the Tribunal were not taken to any evidence in this regard.

(52) The claimants did not cooperate or take part in Ms Hill QC's investigation despite several requests and instructions to do so. Thus, her report and outcome was completed without their input. Dr Lifar-Cisse also did not participate in the investigation. Ms Hill QC's report with appendices was substantial. The report dated 2 August 2015 was sent to the claimants. Crucially, it found that the claimant's collective grievance of 12 January 2015 was an act of victimisation against Ms Burns. This finding was reached after much reflection. This was obvious from the report.

(53) In written submissions, Mr Elesinnla referred to Ms Hill QC's report to be at the heart of the dispute in this case. In oral submissions, he referred to it as the 'genesis' of the dispute. He said the Tribunal should not simply endorse the findings and judicial consideration of this report in the previous proceedings involving Dr Lifar-Cisse against the Trust and Ms Hill QC as a named respondent. In those proceedings, the claims of direct race discrimination and victimisation failed. That claim was heard by Employment Judge Spencer sitting with members. Although conclusions were reached in respect of Dr Lifar-Cisse's claim, the same report of Ms Hill QC was referred to in general and universal terms. The report, without limitation, was considered to be a fair and reasonable report in its totality not just with regard to aspects concerning Dr Lifar -Cisse.

(54) The same issue received judicial consideration before Employment Judge Webster when a strike out application was made in these proceedings in

relation to the direct race discrimination and victimisation claims concerning Ms Hill QC's report. The strike out application was refused but a deposit order was made in relation to whether the claim, based on the outcome of Ms Hill QC's report was out of time (if it was a one-off act rather than a continuing act). In addition, it was held that the claim based on Ms Hill QC's report being discriminatory (race) was determined to have little reasonable prospects of success. This deposit order was appealed and was heard by Justice Swift in the EAT who upheld the deposit order though he accepted that there had not been a finding regarding the victimisation aspect of the claim. However, he did say this in paragraph 16 which the Tribunal was not taken to:

"*The second submission is that as a matter of substance, the ET's reasons are not sufficient to support the little reasonable prospect of success conclusion. I consider the ET was entitled to reach the conclusion it did. It relied, in particular, on the findings made at the earlier Tribunal hearing of a claim by Dr Lyfar-Cisse. Ms Hill QC was the Second Respondent in those proceedings. I have been referred to the Decision of the ET in that case, in particular at paragraphs 47 to 54. Taking the contents of those paragraphs into account, as the ET in this case clearly did, the conclusion that the complaints at paragraphs 22(1)2(4) and paragraph 23(1)2(2) had little prospect of success was a conclusion that was properly available to the ET"*

(55) The Tribunal did not consider issue estoppel, in so far as it was alleged by the respondent, applied – the parties in these proceedings were not the same. However, the previous judicial findings were not irrelevant – they were highly relevant. The Tribunal read Ms Hill QC's report. The Tribunal found that the finding of victimisation was properly open to Ms Hill QC. It was unambiguously the case that she had reached that finding with care and after consideration of all the material before her. The previous judicial findings and conclusions about the report were reasonable and the non-discrimination findings sound. Notwithstanding the foregoing, in relation to the victimisation claim in these proceedings, the Tribunal reached its own findings in relation to the collective grievance of 12 January 2015. These findings, unanimously, were as follows:

- The Collective grievance was lodged in close proximity to the grievance and appeals of Dr Lyfar-Cisse on 22 and 23 December 2014 respectively.

- The decision or likelihood of raising a collective grievance was known to Dr Lyfar- Cisse when she submitted her grievance and appeal. This was made explicit.

- Dr Kalu had been the accompanying companion for Dr Lifar-Cisse when she was interviewed by Mr Hann on 29 July 2014. He had also been scheduled to accompany Dr Liyar-Cisse previously.

- At the meeting of 29 July 2014, Mr Kalu had expressed in non-neutral terms that if Ms Burns was not punished, he would take the matter further. This was, on the Tribunal's view, much closer to a threat than a reservation of position.

- The Tribunal had regard to the grievance of Ms Burns (4 February 2014) and as found above, saw no reasonable basis for the consequential interpretation of it by the claimants. The complaint of Ms Burns was against Dr Lyfar-Cisse making her sexual orientation known in a public form and also in the context of previous alleged comments about gay marriage; that was it. That she went on to make claims about her alleged control over the network added nothing to suggest it could reasonably be interpreted as stereotypical and/or racially targeting the BME network or its members.

- The Tribunal had regard to the finding by Employment Judge Webster that the claimant's assertion they had no knowledge of Dr Lyfar-Cisse's claim to be not plausible.

(56) The Tribunal found the collective grievance to be retaliatory, heavy handed and an exaggeration and which had been deliberately mis-categorised as having a racial premise when in fact it was supportive of Dr Lyfar-Cisse against a person who had dared to challenge her. The grievance included the remark "Ms Burns should not get away with insulting us simply so that she can lend credibility to the hopelessly flawed allegation of bullying that she has levelled against Dr Lyfar-Cisse". It was in the Tribunal's unanimous view a thought through plan.

(57) The claimants (and the other signatories to the collective grievance) appealed against the report of Ms Hill QC (589). The appeal was to be heard by Julian Lee, Chairman. The respondent's DAW refers back to the grievance procedure for appeals (389). An appeal manager is required to be more senior than the person who heard the grievance (440). The claimants did not attend the appeal hearing and said in advance they would not attend. This was because the authority of the appeal officer, or the policy (DAW) adopted was not accepted. It was considered to be an act of victimisation. The appeal was dismissed on the basis that, by reason of their non-attendance, it was not being pursued. The Tribunal did not consider the appointment of the Chairman out with the policy. He was more senior and the respondent's interpretation of a 'Manager' in a wider and non-literal sense was not unreasonable (604).

(58) In his letter dated 6 November 2015, Mr Lee confirmed that the Trust would write to the claimants in due course about what action would be taken in light of the findings in Ms Hill QC's report (620).

(59) By a letter dated 18 January 2016, Keith Altman, Deputy Medical Director (and appointed case manager) wrote to the claimants commencing a disciplinary investigation under the Maintaining High Professional Standards ('MHPS') procedure applicable to Doctors (627). This was based on the findings of Ms Hill QC's report as a result of which a disciplinary panel could conclude that the claimants had discriminated against Ms Burns by victimising her. In addition, concern was raised about the claimants' refusal to comply with reasonable instructions to take part in that investigation process or the appeal against it. These were stated to amount to possible gross misconduct charges. Further, as a result of the latter, there was considered to be a breakdown of trust between

the claimants and the Trust. The terms of reference were attached. Mr Marco Maccario, Clinical Director, Cardiovascular was appointed as the case investigator, supported by Ms Julia Hollywood, HR. The Trust's Chairman appointed Ms Christine Farnish, a non-executive Director as case manager to oversee the investigation.

(60) A further letter was sent by Mr Maccario inviting the claimants to attend an investigation meeting with him on 8 and 9 February 2016.

(61) In both letters, the claimants were informed of their right to be accompanied from the Disciplinary procedure for medical staff which replicated the MHPS procedure. The right to be accompanied by a friend, partner, spouse, colleague, representative from or retained by a trade union, or a representative from or retained by a medical defence organisation and who may be legally qualified.

(62) The claimants declined the 8 February 2016 date and asked for dates in March to accommodate their accompanying companion. The meetings were thus rescheduled.

(63) Thereafter the claimants informed Mr Maccario they intended to be accompanied by a friend, Mr Elesinnla in a 'non-professional' capacity (646 and 647).

(64) By a letter dated 1 March 2016, Mr Altman informed the claimants that Mr Elesinnla could not be their accompanying companion as he was considered to be a privately retained/instructed lawyer which was not permissible under the right to be accompanied provision. In reaching this position, Mr Altman had regard to Mr Elesinnla having been the Barrister instructed in various litigation involving the claimants (and others) in 2008, and between 2010 and 2014 against the Trust. Mr Altman said it was not appropriate to relabel him as a friend for the purposes of the right to accompaniment.

(65) This led to the claimants raising a grievance against that decision which was heard by Dr Mark Smith, Chief Operating Officer on 25 May 2016 and the grievance was rejected by a letter dated 8 June 2016 (741).. An appeal against that decision was heard by Mr Mark Sinclair, non-executive Director on 12 October 2016 and the appeal was rejected by a letter dated 1 November 2016 (790). The claimants were accompanied by Dr Lyfar-Cisse at both hearings During the course of the grievance and grievance appeal the disciplinary investigation was on hold.

(66) At the heart of the dispute about the right to be accompanied, both parties placed reliance on the Court of Appeal decision in ***Kulkarni v Milton Keynes Hospital NHS Foundation Trust and another [2009] EWCA Civ 789 CA***. The Tribunal read the decision too. The key paragraph, in the Tribunal's view, was paragraph 59 which interpreted the MHPS right to be accompanied provision:

"*The practitioner may be represented in the process by a friend, partner or spouse, colleague or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified*

but they (sic) will not, however, be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence"

Paragraph 59:

"In my view, properly construed, paragraph 22 permits a practitioner to be represented by a legally qualified person, employed or retained by a defence organisation. 'Retained by' must include 'instructed by'. The two words mean the same. However, the doctor is not permitted to bring a legally qualified person whom he has instructed or retained independently, for example, his family solicitor or a barrister instructed by that solicitor. He cannot, for example, bring a legally qualified person employed by a law centre. If he happens to have a spouse, partner, colleague or friend who is legally qualified and who is prepared to represent him, that is permitted."

(67) It was, in the Tribunal's view, a question of interpretation of whether Mr Elesinnla met the description of a 'friend' which was also confirmed by the County Court Judge who ultimately heard the claim for an injunction in January 2018 (Judge Simpkiss, paragraph 25) (289 j) which the Tribunal will address later on in this judgment.

(68) The Tribunal found the issue a lot less complicated than had been laboured through the aforementioned processes. The Tribunal resolved that the key question the respondent was being asked to consider was what was the primary relationship between the claimants and Mr Elesinnla for the purposes of the right to be accompanied? Was he a friend first, who happened to be legally qualified (permissible) or was he a private lawyer of the claimants first notwithstanding that he had also since become a friend (not permissible). There was obviously a control in place with regard to 'legal' representation at such internal hearings but the reason for that was not for the Tribunal to pass judgment on in these proceedings. The upshot was that a lawyer could accompany if he was retained/instructed by a medical defence organisation or if he was a friend, who happened to be legally qualified. Otherwise, a lawyer was not permitted.

(69) The Tribunal found it was entirely open to the respondent to reject that Mr Elesinnla, an independent Barrister, did not meet the definition in answer to the key question (above) based on the substantial history of litigation representation involving Mr Elesinnla (for the claimants) and the Trust. The relationship was one of lawyer-client first. It was that way round rather than a friend who coincidentally happened to be legally qualified. The respondent's interpretation was reasonable.

(70) The Tribunal was provided with evidence that Mr Hale, a white consultant was also previously denied the right to be accompanied by a privately retained lawyer when he was facing disciplinary proceedings under the MHPS procedure. In concluding that Mr Elesinnla was a private lawyer of the claimants

rather than a friend who happened to be legally qualified, the Tribunal found the circumstances comparable.

(71) On 10 November 2016, one of the collective grievance signatories was disciplined for his/her part including the subsequent refusal to participate in the Ms Hill QC investigation or the appeal thereafter. The outcome was a final written warning. The Tribunal did not hear any evidence on the treatment of the other signatories or hear any submissions on it. The letter at page 811 was signed off by Ms O'Dell, Interim Chief nurse, thus the Tribunal found that the person being disciplined was a nurse (and see below). This was subsequently appealed and by an outcome letter dated 16 May 2017, this was unsuccessful. (The Tribunal noted that at that appeal hearing the individual concerned was accompanied by Mr George of the GMB. The outcome letter was addressed to Naty Glennon, who the Tribunal found to be a nurse, in the absence of any evidence to the contrary (840)).

(72) By a letter dated 11 November 2016, Dr Lyfar-Cisse also received a final written warning. This was for bullying and victimisation of Ms Burns (on 12 August 2014), her refusal to take part in Ms Hill QC's investigation and separate discrimination upheld by her remark made against a Mr Ward that she despised (or despaired) white senior managers (815). As above, the tribunal did not hear any evidence on the treatment of Dr Lyfar-Cisse or hear any submissions on it. (Further, Dr Lyfar-Cisse's employment was subsequently terminated confirmed in a letter dated 28 June 2017 (855)).

(73) The claimants commenced a County Court claim on 22 December 2016 seeking a declaration that the respondents were in breach of contract by denying them the right to be accompanied by Mr Elessinla in his capacity as their friend (226).

(74) By a letter dated 28 December 2016, Mr Ogueh's application for an employment break for 2 years was approved. A 5 year break had been requested but not approved. That was not an issue before the Tribunal. The letter confirming the employment break was at page 829a.

(75) Following the conclusion of the grievance and appeal process in to the right to be accompanied by Mr Elesinnla, Mr Maccario re-commenced the disciplinary investigation under the MHPS. He wrote letters to the claimants on 24 February 2017 (831). The claimants were invited to a meeting on 6 April 2017.

(76) The claimants objected to the continuance of the investigation because of the the outstanding County Court claim they had issued. By a letter dated 9 March 2017, Mr Maccario said he would need to take advice from Mr Altman, case manager. At the same time he informed the claimants there may be a short delay as Mr Altman was leaving the Trust (838).

(77) By a letter dated 26 May 2017, Mr Carter, Consultant Urologist, wrote to the claimants explaining he had taken over as case manager. He also informed the claimants that Joanna Crane a non-executive Director, had been appointed to

oversee the investigation. The claimants were asked if they were still insisting on Mr Elessinla accompanying them to an investigation meeting.

(78) There followed an exchange of emails between 1 June and 8 June 2017 which concluded with Mr Carter saying that as the claimants would not attend with anyone other than Mr Elessinla, he would advise Mr Maccario to conclude the investigation without the participation of the claimants (850). In an email dated 12 June 2017, Abbi Denyer, Head of Employee Relations and Medical HR wrote to NCAS to provide a procedure update. In her email, she cited that County Court proceedings which the claimants were saying should conclude first, but as no date was known, the Trust did not consider it appropriate to wait and thus had asked if the claimants would attend with a different companion (853).

(79) Mr Maccario produced an investigation report dated 12 July 2017. This was at page 860. Within the appendices referred to was Ms Hill QC's report with appendices. Mr Maccario's findings were that in relation to all three matters, there may be sufficient evidence to support the allegation that the claimants had victimised Ms Burns, there was no good or justifiable cause for their non-participation in the investigation process or the subsequent appeal and that they may have breached their implied obligation of trust and confidence. He stopped short of making any recommendations which he felt was for the case manager. The Tribunal was satisfied based on his report and oral testimony that Mr Maccario did independently review the case notwithstanding the substantial earlier investigation of Ms Hill QC. To the extent that there was insufficient further probing or inquiry, the Tribunal found unanimously, that this due to the non-participation/attendance in the process by the claimants or the provision of representations – it was not the fault of the case investigator. It was abundantly clear from the report that Mr Maccario's outcome was in part shaped by their lack of involvement.

(80) Mr Maccario was also challenged on whether the report was his own work. The Tribunal observed in cross examination that Mr Maccario appeared defensive about this challenge and his evidence did waver. However, the Tribunal took notice of English not being Mr Maccario's first language and that phrases which were being put to him such as 'victimisation' and 'protected act' under cross examination could have been put in more lay terms – the Tribunal itself made this point during cross examination. It is right that the report itself used such language but this is where the Tribunal found that he was likely to have been assisted by HR. It was not, in the Tribunal's view the case that Mr Macccario did not appreciate the meaning of the victimisation finding – his report referred to motive (for the collective grievance), support for Dr Lyfar-Cisse and a reaction to Ms Burns' criticism of her. He was able to contextualise his thought process in oral testimony too when he referred to Ms Burns being a new member of the BME when deliberating over the reason why the claimants had submitted a collective grievance.

(81) The Tribunal was satisfied that Mr Maccario had initially felt challenged about the report's ultimate approval and responsibility and there was nothing remarkable in his subsequent acceptance that the report's authorship had

received HR input. There was nothing unusual, in the Tribunal's collective experience, for HR to support with drafting and/or in making suggestions about structure and terminology too. There was no evidence before the Tribunal of any other versions or of any email exchange relating to the report from which any inference could be drawn.

(82) By a letter dated 4 September 2017, Mr Carter, case manager, informed the claimants that following his consideration of Mr Maccario's report, he felt there was sufficient evidence to warrant the holding of a disciplinary hearing (898). A copy of the investigation report was enclosed.

(83) On 11 September 2017, Mr Carter prepared a management case report setting out the case against the claimants (902).

(84) By a letter dated 11 September 2017, Dr George Findlay, Deputy Chief Executive and Medical Director wrote to the claimants inviting them to attend a disciplinary hearing on 20 September 2017 to answer charges that (1) they had discriminated against Ms Burns by victimising her (2) that they had (repeatedly) failed/refused to comply with reasonable management instructions to participate in Ms Hill QC's investigation and (3) that by reason of (2), there was a breakdown in the employment relationship by reason of the claimants' breach of the implied term of trust and confidence. The claimants were informed that the first two charges individually or cumulatively could amount to gross misconduct and issue (3) could lead to termination for some other substantial reason. They were also informed that they could question Mr Carter or Mr Maccario at the hearing, forewarned of the possibility of dismissal and of their right to be accompanied. The letter was at page 910 and stated that all documentation (the management case, the investigation report (with appendices) and the Trust's disciplinary procedure) in support would be provided separately.

(85) On 13 September 2017, the documentation was sent by email and by hard copy on 14 September 2017. Dr Findlay understood the claimants already had Ms Hill QC's report already and thus this was not provided again (916).

(86) By an email dated 13 September 2017, the claimants wrote to Ms Marianne Griffiths, Chief Executive and Dr Findlay, seeking a postponement of the disciplinary hearing until their County Court litigation had been resolved. If they did not get such an assurance, they said they would seek an injunction to restrain the process. Within the same email, the claimants, in summary, sought to raise a grievance against Ms Griffiths and Mr Carter for their failure to stop (and continue in Mr Carter's case) the process notwithstanding the on-going County Court litigation. In relation to Dr Findlay, the claimants questioned his impartiality to hear the disciplinary case as the claimants alleged he had previously made negative remarks about Mr Kalu since assuming responsibility for the Trust and thus they believed he had hostility towards the claimants (918).

(87) It was the respondent's case that the claimants' criticisms of the continuance of the disciplinary procedure were matters to be addressed as part and parcel of the on-going procedure and could be raised at the hearing. In relation, to the

allegations regarding Dr Findlay however, the respondent considered these needed to be investigated first as they related to whether he should preside over the hearing. The Tribunal found that this was an approach which was reasonable and open to the respondent to take. The decision to pursue the disciplinary case during the concurrency of the County Court litigation was something that could be raised at the disciplinary hearing. The Tribunal found that it was extremely far-fetched for the complaint against Ms Griffiths to be considered as a grievance given that she had had no involvement to date in the matter; her seniority and knowledge was not a sufficient premise. The forum to challenge the decision to proceed to a hearing was in the disciplinary hearing and subject to its outcome, via an appeal.

(88) There followed conversations with Mr Tosin Ajala, Clinical Director (15 September 2017) and Ms Heather Brown, Deputy Medical Director (18 September 2017), undertaken by Ms Farmer, Chief Workforce and Organisational Development Officer. Both of these individuals had been named in Mr Kalu's email of 13 September 2017. The notes of these discussions were on pages 922 and 923. Mr Ajala recalled a conversation in which Dr Findlay had referred to a need to stop a 'culture of grievances'. Ms Brown stated that Dr Findlay was still very new here and was information gathering. She had stated to Dr Findlay that she did not think the claimants were difficult. She said she had found Dr Findlay receptive but considered he had been told of issues in the department. She also stated that Dr Findlay had taken note of her comments, did not have a fixed view and she considered Dr Findlay to be measured and who listened, consistent with the rest of her dealings with him. The Tribunal found the notes of Ms Farmer to be a fair and accurate summary compiled from handwritten notes taken contemporaneously. There was a challenge to the accuracy and/or authenticity of the transcribed notes but the Tribunal accepted the evidence of Ms Farmer in paragraph 31 of her witness statement. There was no oral testimony from either Ms Brown or Mr Ajala.

(89) Ms Farmer's conclusion was that there was no reason to remove Dr Findlay from the process and in fact felt reassured (paragraph 23 and 26 of her witness statement). This was a view shared by Ms Griffiths. In so far as the context was kept brief or not more detailed, this was appropriate with regard to the confidentiality around the process from which this enquiry had been prompted. The Tribunal found she was entitled to hold that view following her the response to her enquiries.

(90) In evidence, Dr Findlay was asked about his reference to a culture of grievances and he explained this related to the findings in the 2016 Care Quality Commission report ('CQC') 2016 about the nature and volume of grievances in the Trust (which was consistent with Ms Farmer's belief at the time – paragraph 24 of her witness statement). In addition, he explained in testimony that he had been made aware of the MHPS disciplinary proceedings which had been commenced and were on-going against the claimants. (This included the persistent refusal of the claimants to take part in Ms Hill QC's investigation process and the subsequent appeal too and the Tribunal found that it was in this context that Dr Findlay discussed the 'difficulties' in the O&G department).

(91) The Tribunal did not hear from Ms Brown. However the claimants had been permitted, on day one of the Hearing, to adduce in evidence a further statement from Ms Brown purported to be dated 24 October 2017, but which was not served on the respondent until the day before the Hearing (pages 2268-2269). There was no explanation for this. The Tribunal admitted it as it considered the statement may be relevant to the issues in the case. This was said at the time the Tribunal announced its decision.

(92) The statement was unsigned and contained various paragraphs under different dates – 7 March 2017, 18 September 2017 and 29 September 2017. The Tribunal found that these were not contemporaneous entries, neither did they read as such. Indeed the first entry (March 2017) pre-dated the change in management of the Trust which was in the following month. Although there was reference to contemporaneous notes (in relation to 18 September 2017 when Ms Farmer had spoken to Ms Brown), these were never produced in evidence. The Tribunal was not satisfied that the statement was contemporaneous as at 24 October 2017 either. There was no explanation why if the statement did exist then, it had not been produced sooner than the day before the Tribunal Hearing just over 3 years later. Where there was a variance in what was said at the time (April 2017), the Tribunal preferred the evidence (and notes) of Ms Farmer. The Tribunal will deal below with the notes under 29 September 2017 which relate to the appeal.

(93) On 18 September 2017 (two days before the disciplinary hearing), the claimants applied for injunctive relief in the Brighton County Court in relation to the right of accompaniment. This had not been previously sought. The particulars of claim issued on 22 December 2016 had sought declaratory relief (page 230). The application was refused. HHJ Simpkiss stated in his Order of 19 September 2017 (255):

"It is not appropriate to list this ex-parte or to abbreviate the notice period. This issue has been known about by the claimant for a very long time and he has not sought an injunction until yesterday (18/09/2017). The claimant should apply at the disciplinary hearing on 20 September 2017 if he requires an adjournment."

(94) When the Judgment was handed down in relation to the injunction application on 15 January 2018, following a Hearing on 26 October 2017, in paragraphs 14 and 56 of that Judgment, the Judge was similarly critical of the claimants' decision to leave the application for interim relief to the "last minute" (paragraph 14) and that the claimants had "only themselves to blame for the situation they found themselves in procedurally" (paragraph 56). Further, the Judge continued:

"*They had not obtained confirmation from the defendant that the MHPS investigation would be on hold until the conclusion of these proceedings – on the contrary they were told that it was continuing, Even taking in to account they were acting in person, this is unacceptable. Furthermore, they could, presumably have obtained some advice from Mr Elesinnla, No reasons have been given for the lateness of the application."*

(95) The Judge had also remarked in paragraph 54 of his Judgment that although the claimants had sought a declaration that Mr Elesinnla be allowed to attend the MHPS investigation, the defendants (respondents) had made it clear throughout that the investigation was continuing, had sent the claimants the report following the investigation and notice of the disciplinary hearing. It wasn't until the application was issued on 18 September 2017, that any claim was made into the disciplinary process as a whole. The injunction sought was to restrain the continuance of the disciplinary process until the resolution of the original proceedings. The Judge remarked that this was pointless because the MHPS investigation had by then been concluded (paragraph 54).

(96) It was against this background that the disciplinary hearing took place on 20 September 2017. Mr Kalu attended (Mr Ogueh did not) and sought an adjournment. This was refused. Dr Findlay explained at the disciplinary hearing and in his witness statement that the reason why he decided not to postpone the hearing was first because the Court had not intervened (and granted an injunction); the Court had said the claimants could 'request' a postponement but it was no more than that. Second, that it was for the Trust to manage its own internal procedure and decide to proceed or not. In this regard, Dr Findlay noted that the matter had been on-going for a very long time requiring resolution. Third, Dr Findlay also took in to account his own view and interpretation of the right to be accompanied provision which was consistent with the Trust's position to date. The Tribunal found that this was an approach open to the respondent, particularly having regard to the laboured approach of the claimants to the injunctive relief sought. The Tribunal concurred with the earlier Judicial view that the application should have been sought a long time before 18 September 2017 and before the MHPS investigation procedure had concluded.

(97) Dr Findlay tried to persuade Mr Kalu to remain and participate in the hearing. This did not happen as Mr Kalu said he was also not prepared. The Tribunal found the claimants absence of a plan B option to be unprofessional and self-damaging. Their criticisms of the continuance of process or indeed the challenge to Dr Findlay hearing the case could have been made at the hearing including enquiry of the Trust's response to the criticisms. This was expressly stated in Ms Griffith's email (page 925).

(98) The case was thus heard against the claimants in their absence which Dr Findlay had forewarned before giving Mr Kalu the option to remain and participate.

(99) The charges against the claimants were upheld. The minutes of the disciplinary hearing were not challenged/disputed (and could not realistically have been disputed in the claimants' absence) and were found to be an accurate and fair summary (pages 931-943). Dr Findlay's reasons were set out in his witness statement paragraphs 56 to 73. He found the claimants were guilty of victimisation in bad faith and repeatedly refusing to comply with reasonable instructions to cooperate in the investigation, both of which he considered to be gross misconduct individually or cumulatively. The seniority of the claimants was cited in particular in Dr Findlay's decision making process. Separately, he

concluded the refusal to engage in the investigation process was a breach of their duty of trust and confidence which had caused a complete breakdown in the employment relationship as a result. The sanction of dismissal was considered appropriate by Dr Findlay. He explained he had regard to expectations of senior clinicians that they must lead by example (paragraph 64) and he further concluded there was no good or justifiable reason for their behaviour regarding the investigation which he considered to be deliberate and calculated. He formed a view that the claimants felt they were 'beyond management' if they personally considered an action to be inappropriate (paragraph 74). He considered this unsustainable.

(100) The written decision to terminate the claimants' employment was sent on 22 September 2017 (pages 958-967). It contained a right of appeal which the claimants duly exercised by their letter dated 6 October 2017 (page 992). In the letter, they stated they had no intention of attending an appeal hearing without Mr Elesinnla which they said was the subject of a Court Hearing on 26 October 2017.

(101) After the claimants dismissals, Dr Findlay had to consider if this required reporting to the GMC. Dr Findlay sought advice from Mr Michael Cotton, The Trust's Employee Liaison Officer. Dr Findlay understood Mr Cotton's role to include consideration of cases that might require a GMC referral. Mr Cotton's advice was that a GMC referral was appropriate (paragraph 78 Dr Findlay's witness statement). There was an exchange of emails between Dr Findlay and Mr Cotton which confirmed that a conversation had taken place and further that on Dr Findlay's suggestion it was preferable to delay any referral until after the appeals process had concluded. Within Dr Findlay's email of 10 October 2017, he also stated that there had been no clinical concerns regarding the claimants (pages 980-981).

(102) On 12 October, the claimants wrote to Ms Farmer raising questions about the concerns they had raised prior to the disciplinary hearing regarding Ms Griffiths, Mr Carter and Dr Findlay and requested statements gathered during the investigation. They also requested access to their personnel files (page 991).

(103) Ms Farmer responded on 13 October 2017 acknowledging the appeal and stated that arrangements were being put in place to deal with it. Further, that she would arrange for a copy of their HR files to be sent. In relation to the questions raised (concerning Ms Griffiths, Mr Carter and Dr Findlay her view was that those matters could be raised and addressed within the appeal process. In relation to that decision of Ms Farmer at that time, the Tribunal found this to be a reasonable response. The Tribunal will address later the position regarding the provision of notes of Ms Farmer's discussions with Mr Ajala and Ms Brown.

(104) The appeal was due to be heard by Mr Michael Viggers. Mr Viggers was the Chair of the Trust as well as the Chair of Western. He retired in May 2018. There was a delay in scheduling an appeal date. The respondent asserted this owing to difficulties with the claimant's availability. This was not disputed or

challenged by the claimants and was not in itself an issue in the case. The appeal date was set for 10 April 2018.

(105) Mr Viggers wrote to the claimants on 16 March 2018 about the arrangements for the appeal hearing. The letter explained the delay from November in trying to get a date in particular that the claimants had asked for dates after January and rejected February by reason of holidays. Mr Viggers explained that Mr Peter Lanstrom, Chief Delivery and Strategy Officer and Ms Kirsten Baker, a non-executive Director, would be on the appeal panel. Further that Dr Findlay would be in attendance to present his response to the appeal.

(106) Mr Viggers also confirmed that documents/notes relating to Ms Farmer's investigation shortly before the disciplinary hearing (pertaining to Dr Findlay) would also be provided. Mr Viggers also said the Trust would not allow Mr Elesinnla to attend the hearing as an accompanying companion.

(107) On the day before the appeal hearing, Mr Viggers received a lengthy email from the claimants (pages 1012-1019). Mr Viggers interpreted the email as extremely hostile. The email's content included the following in particular:

- Discriminatory remarks attributed to David Cameron about Nigeria and corruption
- Statements that the NHS was racist
- That the treatment afforded to Ms Burns was an example of white privilege
- That there was a racist agenda behind the investigation (conducted by Ms Hill QC)
- That the Trust's Solicitors were racist and dishonest
- The claimants doubted that Mr Viggers had the intellectual capability to understand [the decision in] Kulkarni
- The claimants had heard that Mr Viggers was retiring soon which they welcomed as he could no longer "blight black lives anymore with racism"
- The claimants stated that Mr Viggers was a racist and lacked the intellectual capability to discern right from wrong
- In relation to any involvement of Dr Farine Clarke (who is black) in the process this was described as an example of " if you want to roast a black man, you get another one to turn the spit"
- That irrespective of the outcome of the appeal hearing, Mr Viggers would be joined as a party to the proceedings
- The email ended with a reference to an attachment of the claim to the Employment Tribunal

(108) The claimants in this email acknowledged that it 'has of necessity been aggressive'. In Mr Kalu's witness statement paragraph 201, Mr Kalu stated that he had been told that a Tribunal was likely to take a dim view of his correspondence but in response he said he did not care. He went on to say he did not require a commentary on his correspondence from the Tribunal.

(109) Whilst the Tribunal noted the claimant's invitation not to comment, it was flatly rejected. The tone and content of the email was inflammatory, offensively

explicit and unjustified because the recipient and target of the communication was someone independently appointed whom the claimants knew, or ought to have known, had no involvement to date and did not personally know. That the claimants had previously copied him in their email of 13 September (918-921), (in relation to which he did nothing and neither was it alleged that he had) did not impute Mr Viggers with any knowledge disqualifying him from hearing the appeal and certainly not to implicate him in any alleged racist conspiracy or agenda. It was the claimants election to copy him in. He was not copied in to the reply to it. Paragraph 5 of Mr Viggers' witness statement was accepted.

(110) The Tribunal had regard to the professional and measured resilience of Mr Viggers to try and unearth what had caused the claimants, two doctors, to have such a sense of grievance and anger (paragraph 13 of his witness statement), notwithstanding the character assassination of him by the claimants. In addition, the Tribunal found Mr Viggers' oral testimony to be thoroughly credible. In particular, he conveyed with conviction, his desire to be objective and revisit the past and came across as passionate to try and turn around a bad news story in to a positive one. To have such a person presiding over the appeal was fortunate. He was the most senior person of the Trust; this was the claimants' last opportunity to change the outcome and the claimants ought to have realised that an appeal which they had instigated could overturn their dismissal. For the avoidance of doubt the Tribunal did not find Mr Viggers' evidence to be self-serving and opportunistic given the claimants non-attendance at the appeal hearing. Further, he gave evidence that he had previously overturned earlier decisions at an appeal. This was accepted.

(111) The Tribunal further noted that the claimants in their email of 9 April, had alleged inconsistency between them having never met Ms Burns yet were found to have victimised her and a long list of individuals in the Trust who did not know and had not met the claimants being used as a reason why they could not be 'discriminators'. The Tribunal found that comparison to be ill-founded and misconceived as it ignored completely the context; that most if not all of the individuals referred to were tasked professionally to resolve a dispute or to make a decision within a formal process.

(112) Mr Viggers informed the claimants that whilst disappointed they would not be attending, following discussion with the panel members, the appeal hearing would continue in the afternoon. There was a response from the claimants which levelled further racial accusations against Mr Viggers and also criticised his decision not to allow their right of accompaniment (by Mr Elesinnla) and also referred to the outstanding information awaited from Ms Farmer.

(113) The appeal was heard and rejected (pages 997(a) to 997(f)). During the course of the appeal hearing, several questions were put to Dr Findlay by the panel and Dr Findlay responded to all appeal grounds and the email received the day before from the claimants. It also became apparent that he had notes of the meetings Ms Farmer had had with Mr Ajala and Ms Brown but which the appeal panel had not seen. During the Tribunal hearing, Mr Viggers stated he believed he had seen them shortly before the appeal hearing but subsequently accepted that he had only seen them at the appeal hearing. The Tribunal accepted he

had been mistaken in this regard. The Tribunal found that these notes had not previously been sent to the claimants despite their requests for the same more than once. This was not reasonable, although the Tribunal accepted that this was an oversight rather than deliberate or intentional.

(114) The appeal panel had also considered the allegations made against Dr Findlay, that he spoke after the dismissal about refusing to reinstate the claimants even if this was ordered by a Tribunal. This had been raised by the claimants in an email to Dr Findlay dated 30 September 2017 (page 969) and Dr Findlay had denied he had said what had been attributed to him. He denied this in 2 separate emails on 5 October 2017 (973) and 10 October 2017 (979) and did not wish to engage in a dialogue in correspondence as he felt this was now for the appeal panel. The meeting was a departmental meeting at which clinical services and gaps were being discussed in light of the claimants' dismissals. There were other vacancies too thus a discussion about recruitment was appropriate. In his email of 5 October 2017, Dr Findlay said he had been careful to be clear their positions (the claimants') were confidential when questions were asked. It was common ground that the claimants were not present at this meeting. There was no statement from Mr Kelada and no separate enquiry of him. The appeal panel accepted Dr Findlay's explanation at the appeal hearing that nothing was said about the future being pre-judged and that the claimants' version was misleading. It was open to them to do so.

(115) The Tribunal observed that the claimants were not present at that meeting. They did not attend the appeal hearing. The person who was alleged to have informed them of what was said was not called as a witness at the Tribunal hearing (Mr Kelada). Neither was Ms Brown, whose additional statement had been relied upon by the claimants on the first day of the Tribunal Hearing. Neither was there any explanation provided for them not being called. Dr Findlay had maintained his position under oath. The Tribunal found Dr Findlay credible in this regard and accepted his evidence.

(116) After the appeal panel had convened two further emails were received from the claimants dated 10 and 12 April 2018 challenging Mr Viggers' impartiality and making further allegations of racism against him. In the email of 12 April, the claimants said Mr Viggers had been intimately involved in the campaign against the BMEs by the Trust. The Tribunal were not taken to any evidential basis for such a statement and found it to be baseless.

(117) There was a quarterly Employer Liaison meeting on 11 April 2018 involving Dr Findlay, Mr Cotton and others. At this meeting, the referral of the claimants was discussed and it was agreed that this would happen only if the appeal was not upheld. The notes of the meeting confirmed that the Employee liaison officer had previously discussed and supported Dr Findlay's suggestion not to refer the claimants until their appeals had been heard.

(118) The outcome letter dated 20 April 2020 was at pages 1020-1029. This was outside of the 7 working day time period for when a decision should be given by one day (page 421). The Tribunal found the appeal format to have been a review of the decision to dismiss and a full consideration of all the appeal

grounds. The outcome letter made it clear that all documentation received before the appeal hearing had been considered including the 9 April email and the draft claim to the Tribunal. The emails received after were not considered by the panel but Mr Viggers rejected in general/broad terms any allegation of bias or a campaign against the BME.

(119) The outcome letter said the appeal minutes would follow. There was a reference to Dr Farmer's notes attached ('DF notes.pdf') in the email from Ms Kempson sent on behalf of Mr Viggers on 20 April 2018 (pages 1033/1034). The response from the claimants on the same day queried where the "Farmer notes had suddenly emerged from" though in later email that day the claimants said they were still awaiting receipt. The Tribunal found the former a reference was to the production of the notes at the appeal hearing as referred to in the appeal outcome letter. They were sent to the claimants on 23 April 2018 (pages 1031/1032). There was no email in the bundle under cover of which the minutes of the hearing were sent. The Tribunal found based on the agreed issue that these were received by the claimants on 26 April 2018.

(120) On 4 June 2018, Dr Findlay also completed the referral document to the GMC. This was at pages 1036 to 1043. Dr Findlay included NCAS advice emails of 16 March 2016 and 15 June 2017, the terms of reference for the MHPS investigation, the MHPS investigation report, disciplinary hearing management case, disciplinary hearing outcome letter, appeal outcome letter and appeal correspondence. Subsequently, upon enquiry, further documentation was requested by the GMC as referred to within the documentation provided and the Tribunal found was provided based on the GMC's acknowledgement they had collected all information requested (page 1056).

(121) The Tribunal also heard evidence that before the change in management of the Trust in April 2017, Dr Findlay and Ms Griffiths had delivered a presentation to Senior Leaders at the Trust. This did not appear to have been raised by the claimants during the disciplinary or appeal process. It was not in their email of 13 September 2017 or their grounds of appeal. It was alleged by the claimants that they had conveyed a lack of tolerance towards discrimination grievances in particular from the BME network. The claimants were not present at this meeting. Neither was any evidence heard from anyone on behalf of the claimants, in particular from anyone present or who had conveyed this information. No other emails or documents were provided. Dr Findlay and Ms Griffiths rejected the assertion. They accepted they had made comments, in the light of the 2016 CQC report, that there appeared to be a culture of grievances and that the Trust ought to find a better way to address concerns other than formal disciplinary and grievance processes. This was not specifically about discrimination based issues but about behaviours broadly/generally. The evidence of Dr Findlay and Ms Griffiths was corroborative. Ms Griffiths specifically recollected the meeting as she said she had been asked about this before. The Tribunal found their evidence to be credible and it was accepted.

Findings on Inferences, the evidence and Credibility

(122) In various documents in the bundle and in various places in the claimants' witness evidence, some of which has been identified above the claimants asserted that the GMC was racist (pages 1043 and 1063); the Judiciary was racist page 1063 & paragraph 190 of Dr Kalu's witness statement; in addition, the NHS and British Society was racist. The claimants confirmed their belief that most if not all of the individuals involved in decision making or a process in relation to the matters which gave rise to these proceedings, were racist. This was said unambiguously in oral testimony under cross examination. The claimant did not know nor had met a majority of those individuals. In response to Tribunal questioning, the claimants confirmed their view that if an individual was not anti-racist, he/she was racist.

(123) The Tribunal found these assertions did not assist the claimants in their specific discrimination allegations against the respondent in these proceedings. The Tribunal took the view that these were 'universal', not specific views, some could be historic, alternatively politically held opinions. The Tribunal were not sitting in judgment on institutional racism within the respondent organisation nor within the other institutions cited or wider British society. The 'reason why' test is embedded in direct discrimination legislation. It requires an analysis of why someone has acted as they have done. However, there is more than one answer to why somebody who is anti-racist would not necessarily manifest anti-racist behaviour. It could be personality, cognitive or otherwise. It does not provide an insight into the 'reason why' test.

(124) Whilst the Tribunal were referred to the fact of earlier discrimination litigation of the claimants against the Trust, there was no evidence before the Tribunal or submission made of any finding of discrimination or victimisation against the Trust. There was one reference to an appellate Court determining a point in the claimants' favour in relation to the admissibility/redaction of evidence but that was not the same. On the contrary, the Tribunal had evidence before it of 2 white doctors who had been dismissed for gross misconduct by the trust (Mr Hale and Mr Howell) because of a belief in discrimination by them. This was evidence, the tribunal found, that the Trust did and had acted on allegations and findings of discrimination.

(125) The Tribunal also noted there was no corroborative testimony offered in support of the claimants' claims. None of: Mr Rose, Ms Brown, Mr Udemezue, Mr Kelada, Dr Lyfar-Cisse and the person who informed the claimants that discrimination grievances would not be tolerated were called. Neither was the Tribunal informed whether any had been approached or why they had considered it relevant to call any of these individuals. The Tribunal found this prejudicial to the claimants to the comparative assessment of the credibility of the evidence.

(126) The Tribunal found both the CQC report of 2016 and the report of 2018 offered the Tribunal some background context potentially relevant to the drawing of inferences where appropriate. The report of 2016 showed a poor picture of diversity and race related issues in the Trust. In particular respondents from the BME and protected characteristics groups reported that bullying, harassment and discrimination was rife (page 1987). There were adverse statistics, for

example, the prospects of BME network members being more likely to be disciplined (an increase from 1.1 to 2.3 more likely) and less likely to be promoted (holding only 6.6% of band 8-9 posts despite 15% of the Trust being BME) and white staff being 1.26 % more likely to be appointed following job application. A race equality workforce engagement strategy had fallen in to 'disarray' amongst a culture of disciplinary action and grievance.

(127) The 2018 CQC however showed a dramatic difference This coincided with the change in management of the Trust from April 2017 onwards. This report was produced during the course of the Hearing as Ms Griffiths made reference to it and the Tribunal considered it relevant. On page 19, the report referred to a paradigm shift in culture across the Trust. The report referred to equality and diversity being promoted and the newly formed BME (working group) reported a 'dramatic' change in the past 6-9 months. The most notable remarks were as follows (emphasis underlined):

" The relationship between the Trust and the BME network (referred to in our previous report) had broken down and the Trust no longer recognised this group. CQC facilitated a focus group with the previous BME representative group who chose not to attend to share their views with us. BME staff we spoke with that were working at the Trust described the damage they felt had been done by the previous BME representative group. They told us that now they were not operating in the Trust, 'the fear had gone'. As part of the Leadership, Culture and Workforce programme, the chief executive directly led the Equality and Diversity Workstream."

(128) The Tribunal deliberated that there was more than one way of considering the relevance of this change. Based on the claimant's case, it was evidence of the BME network being dismantled. On the other hand, it endorsed the need for a culture change and also provided an anonymous, independently sourced, damning verdict on the previous BME network which in the context of this case, in particular the pivotal collective grievance of 12 January 2015, provided some corroborative support for the interpretation of the reason behind that communication.

(129) The Tribunal also noted the claimants' assertions about the telephone call log being exclusive which could disprove the respondent's assertion regarding whether a telephone call was made or not. However whilst raised during the course of the Hearing it was never re-visited and the Tribunal were not taken to a log. There was also an assertion that Mr Maccario's evidence may have been interfered with 'overnight' whilst he remained under oath. Upon being probed by the Tribunal in this regard, Mr Elesinnla asserted he did not mean there had been unlawful interference with a witness and that he had meant the possibility of divine intervention. This was an unprofessional and sarcastic response to the Tribunal in respect of what was initially, a very serious allegation.

Applicable law

Unfair Dismissal – S.98 (2) & (4) Employment Rights Act 1996 ('ERA')

(130) The respondent relied on S.98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.

(131) Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case. The test in this case was comparable to the well-known Burchell test: that the respondent genuinely believed that there was a loss of trust and confidence in the claimant, that belief was based on reasonable grounds and that there was as much investigation as was reasonable.

(132) The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure.

Discrimination - S.13 & S.27 (Race) Equality Act 2010 ('EqA')

(133) The direct race and victimisations provision of the EqA say:

S.13: Direct:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"

S.27: Victimisation:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because:

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(134) The burden of proof is set out in S.136 (2) EqA. This provides:

"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."

(135) S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(136) The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

(137) The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(138) In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

(139) In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination*"

(140) By S.123 EqA, a Tribunal may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable

<u>Protected Disclosure claims</u>

(141) Under S.103A ERA, an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason, for the dismissal is that the employee made a protected disclosure.

(142) By virtue of S.47B ERA, a worker has the right not be subjected to a detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. In ***NHS Manchester v Fecitt and others 2012 IRLR 64***, it was stated that the test is whether the protected disclosure "materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

(143) A protected disclosure qualifying for protection is one made in accordance with S.43A (which refers to S.43 C to S.43H about the conveyance of a qualifying disclosure) and S.43B (which defines a qualifying disclosure).

(144) S.43B ERA says:

Disclosures qualifying for protection:

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.

(145) S.43B ERA requires consideration of whether the claimant had a reasonable belief that the information disclosed is made in the public interest and tends to show one of the six matters listed above (subjective test) and if so, was that belief a reasonable one (objective). ***Chestertons Global Ltd v Nurmohammed 2018 ICR 731 CA*** and ***Babula v Waltham Forest College 2007 EWCA Civ 174.***

(146) Pursuant to S.48 (2) ERA, the burden of proof in relation to the reason for the alleged detrimental treatment rests on the respondent. However this is once a protected disclosure has been established and that the respondent has subjected the claimant to a detriment.

(147) In relation to S.103A ERA, the burden of proof in relation to dismissal was addressed in ***Kuzel v Roche Products Ltd [2008] EWCA Civ 380, CA*** :

"57…*when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable

inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

(148) Pursuant to S. 48 (3) ERA, an Employment Tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Conclusions and analysis on the Issues (see appendix 1)

The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Were any of the following a Protected Disclosure and/or a Protected Act?

Collective Grievance – 12 January 2015

(149) The Tribunal concluded, having regard to its findings above, that the collective grievance raised on 12 January 2015 was not a protected disclosure. The Tribunal concluded that the claimants did not, subjectively, hold a reasonable belief that the disclosure tended to show that Ms Burn's grievance was a discriminatory/stereotypical assumption that BME Network members were

homophobic and would, as a result, isolate her. The Tribunal recognised that a disclosure does not need to be in good faith and can have more than one purpose. However, the Tribunal concluded that the purpose of the grievance was, exclusively, to victimise against Ms Burns which was an unlawful purpose. Alternatively, the Tribunal concluded the claimants did not have a reasonable belief, objectively, that they were making a disclosure of information which tended to show that Ms Burn's grievance of 5 February 2014 was a discriminatory/stereotypical assumption that BME Network members were homophobic and would, as a result, isolate her. On no reasonable reading of Ms Burns' grievance was it a discriminatory remark or a stereotypical assumption about the claimants, the collective grievance signatories or the BME network, whether in relation to alleged homophobia, or, being subject to or under the control of Dr Lyfar-Cisse. The latter was a remark about the leadership /influence and could not be interpreted on any reasonable reading, even allowing for flexibility and latitude, in the way interpreted by the claimants. In addition, the Tribunal concluded for the above reasons, that the claimants did not subjectively believe that the disclosure was in the public interest. There was no genuine subjective belief because the grievance was raised solely to victimise/discriminate against Ms Burns. Alternatively, the disclosure was not, objectively in the public interest. Having regard to the four factor guidance in ***Chesterton*** the Tribunal concluded that the numbers in the group whose interests the disclosure served was, in reality, the claimants and the collective grievance signatories only and not the wider or entire BME network. The wider BME network members could but did not sign the grievance. There was reference to up to 50 'wishing' to do so but they did not sign. Further, the grievance was not submitted for and on behalf of the BME network. Having regard to the nature of the interests affected, the Tribunal concluded that the collective grievance was not, having regard to the Tribunal's conclusion on the objective element of whether the disclosure tended to show a breach of a legal obligation, of a very important interest. Having regard to the nature of the wrongdoing, the Tribunal concluded there was no disclosure of deliberate wrongdoing. Finally, with regard to the identity of the alleged wrongdoer, Ms Burns was not a doctor nor a senior figure in the Trust.

(150) The collective grievance was potentially a protected act. There was no express reference to discrimination, or the Equality Act or the claimants' race. The Tribunal noted however that there were references to the BME network which was, by definition, a network serving the interests of black and minority members. There was also a reference to a stereotypical view of BME members. The Tribunal concluded that it could be interpreted as an allegation under the EqA S. 27 (2) (d). However, the Tribunal concluded based on its findings above and its conclusions in particular paragraphs 55, 56 and 149, that it was a false allegation and made in bad faith and thus disqualified from protection under S.27 (3).

<u>26 June 2015</u>

(151) The Tribunal concluded that the claimants did not have a subjective reasonable belief that the respondent's decision to invoke the DAW policy to hear their grievance (and the discrimination grievances of the others) and not the

grievance policy was an act of discrimination and thus that it tended to show the respondent had breached a legal obligation or that this was in the public interest. The Tribunal concluded that this was raised solely to support or justify their non-participation in the investigation to date. Alternatively, their belief was not, viewed objectively, reasonable. If their belief was based on their desire to have Ms Burns present to be questioned/interrogated (see findings above), then this was not available under the grievance procedure. The Policy permitted each party to call its own witness but there was no right for one party to insist on someone being present to question (page 438). Further, under the grievance policy (2.9) whilst agreement was required to outsource an investigation and further that heads of terms should be agreed, there was no right for a complainant to agree the choice of that person. There was also an express carve out for discrimination grievances falling outside the grievance policy (1.4) (page 431). In relation to public interest in particular, the Tribunal concluded this was a matter concerning the choice or application of policy in relation to the claimants and 6 other signatories and in context, of moderate interest, based on a professional judgment albeit by a Senior Manager. The belief (in the public interest) was not objectively reasonable.

(152) The Tribunal concluded that the communication was a protected Act under S.27 (2) (d). The email alleged racism against the Trust regarding the non-holding of a grievance hearing.

2 July 2015

(153) This complaint was lodged on behalf of the claimants and the other collective grievance signatories by the GMB. The Tribunal concluded that the claimants did not have a subjective reasonable belief that the respondent's decision to proceed with a DAW investigation process (and not a grievance) and to engage an external lawyer to undertake the investigation, tended to show that the respondent was acting in a discriminatory way and thus was in breach of a legal obligation or that this was in the public interest. The Tribunal concluded that this was raised solely to support or justify their non-participation in the investigation to date. In addition, their criticism of the engagement of Ms Hill QC was solely because the Trust had declined to appoint someone suggested by Dr Lyfar-Cisse (Mr Udemezue). The Tribunal concluded that the claimants knew, based on their relationship with Dr Lyfar-Cisse, that this was someone she had suggested and that in the circumstances that would not have been appropriate or acceptable to the Trust. The Tribunal also concluded having regard to the findings above regarding the claimants' attitude towards a majority of the respondent's personnel who were white and the thrust of their unqualified and universal allegations of race discrimination against them, that the reason they were not satisfied with Ms Hill QC was because she was white. That was in itself an unlawful position to take. Alternatively, the claimants' belief that the Trust's actions were discriminatory and thus a breach of a legal obligation was not objectively reasonable. They knew the reality was that their grievance complaint was arranged to be heard but under the DAW. The second bullet asserting the view that the Trust was instead only going to be assessing Ms Burns' grievance was a complete mischaracterisation of the Trust's approach. Further, their basis to have a legal officer appointed to investigate removed, had

no rational basis at all. She was independent and unconnected to the Trust. They should have welcomed her independence. In relation to public interest in particular, the Tribunal repeats is conclusions above (paragraph 149).

(154) The Tribunal also concluded that this communication was a protected act under S. 27 (2) (d). It contained allegations of discrimination and racism.

27 July 2015

(155) This was another communication from the GMB lodged on behalf of the claimants and the other collective grievance signatories and the GMB.

(156) The Tribunal repeats in conclusions above under paragraph 149 and 151 above. In addition, the Tribunal concluded that there was no evidence before the Tribunal that it had been the working practice of the Trust to afford a complainant the choice of policy to invoke their grievance. The Tribunal was not taken to any information or evidence in support of this assertion regarding why this was believed. In relation to the assertions about the intended scope of the investigation, this had always been made known to the claimants. The terms of reference attached to the invitation letter to the grievance set out the 9 separate grievances that would be part of the investigation (pages 524-526 & 1165A). With these additional points in mind, the Tribunal's conclusion that the claimants did not hold a subjective belief that the disclosure tended to show a breach of a legal obligation or that the disclosure was in the public interest - alternatively that any such belief, if held, was not objectively reasonable – was compounded. The scope of the investigation was unambiguous and this would have been known to the claimants. There was no revision to it and nether was consideration of the collective grievance an after-thought.

(157) The Tribunal also concluded that this communication was a protected act under S. 27 (2) (d). It contained allegations of discrimination and racism.

Other alleged protected disclosures and protected acts

(158) The claimants were given an opportunity to state their position with clarity on other asserted protected disclosures/protected acts and consequential detriments by reference to them. They did not do so. It was not the Tribunal's function to do that. Notwithstanding, the Tribunal decided, unanimously, to accept, broadly, that the previous discrimination litigation of the claimants against the Trust in 2008, 2010, 2011 and 2012 were at least protected acts. There was no dispute or challenge about that from the respondent. However witnesses were not questioned on their knowledge of these earlier claims save that Mr Kershaw did accept he was aware of them in their generality.

(159) Notwithstanding the Tribunal's conclusions on protected disclosures and the first alleged protected act (12 January 2015), the Tribunal went on to consider its conclusions in the alternative as if the four asserted protected disclosures and all protected acts were found to be qualifying protected disclosures or protected acts, though with regard to chronological causation being possible – an alleged detriment could only follow a protected disclosure or protected act

which had already been made. The Tribunal accepted, broadly, that the respondent's witnesses and relevant decision makers, had knowledge of the communications asserted to be protected disclosures or protected acts. There was no challenge from the respondent in this regard. The claimants were questioned about whether Ms Hill QC was aware of their previous litigation and said they were not aware if she was. The Tribunal concluded that Ms Hill QC was not made aware by the respondent, it was not in the terms of reference.

Comparators

(160) The Tribunal considered Ms Burns to be a comparator in so far as it was alleged that she had received more favourable treatment (by being given the right to be accompanied by her partner) during Ms Hill QC's investigation meetings. The circumstances however were not materially the same under S. 23 (1) EqA. This was because the claimant did not request to be accompanied by their partner during that investigation. They asked to be accompanied by Mr Elesinnla, a barrister, at the MHPS investigation. In addition, they did not actually attend Ms Hill QC's investigation meeting. The more appropriate comparator (put forward by the respondent) was Mr Hale who was also denied comparable legal accompaniment during his MHPS process. Alternatively, the Tribunal considered how a hypothetical comparator would have been treated.

Issues 1, 34 & 67

(161) In the light of the Tribunal's findings above, the reason why the claimants' collective grievance was dealt with in the way it was, was not the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason was because as found above, the respondent regarded the multiple grievances which were outstanding at the time, from several individuals, were inextricably linked and because the discrimination grievances were carved out of the grievance policy. It mattered not that there was no collective mechanism in the DAW policy, the respondent was entitled to have regard to the primary subject matter first which dis-engaged the policy. The claimants' right to be accompanied grievance was considered under the grievance policy and though this was alleged to be discriminatory, the primary subject matter was about the right to be accompanied. There was no contrary earlier agreement. The initial response from Mr Kershaw of 16 January 2015 was nothing more than an acknowledgment. To interpret or read this as some form of binding agreement was fanciful. The Tribunal concluded the respondent's decision was not influenced at all, materially or otherwise, by the collective grievance of 12 January 2015. There was no detriment to the claimants, thus the burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied the protected disclosure did not materially influence the respondent's decision. There was no detriment even if the grievance policy should have been used. There was no right to insist on Ms Burns being present. The burden of proof did not shift for the direct race discrimination or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's

explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 2, 35 and 38

(162) In light of the findings above, the reason why Ms Hill QC was appointed to act as investigator was not the claimants' race; or that they had made a protected disclosure or that they had done a protected act. Ms Hill QC was appointed as independent investigator with no previous dealings with the Trust (this was not disputed) who had significant discrimination law pedigree. The Tribunal were left with an in impression that it was her outcome rather her appointment which had bothered the complainants. That will be considered separately but for the purposes of this issue that was the wrong way round. Her appointment was not a matter for agreement with the claimants. That was accepted by the claimants under cross examination. (As found above, there wasn't a requirement for this under the grievance procedure either). That was consistent with the unliteral appointment of Mr Hann (and the person lined up before him from Simons, Muirhead & Burton Solicitors) (pages 2272 & 2277). The Tribunal concluded with regard to Mr Rose that the claimants had not been made aware of his resignation shortly after he had joined the Trust. This became evident during the Hearing when the Tribunal ordered disclosure of any evidence supporting the evidential assertion that Mr Rose had resigned. The disclosed email did support that evidential assertion (2279). The Tribunal were unable to conclude the reason why Mr Rose resigned. He was not called but could have been. Further there was no evidence at all before the Tribunal that his resignation had anything to do with Ms Burns on racial grounds or otherwise. There was no detriment to the claimants, thus the burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied the protected disclosure did not materially influence the respondent's decision . The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 36, 37, 69 and 70 (corresponding issues 3 and 4 relating to direct race discrimination were withdrawn)

(163) In the light of the findings above, the reason why Ms Hill's QC did not consider the communications of 2 July 2015 and 27 July 2015 and the reason why she reached her findings in relation to the collective grievance of 12 January 2015 and her failure to identify them as protected disclosures or protected acts, was not because the claimants had made a protected disclosure or because they had done a protected act. The complaints raised in both 2 July and 27 July communications from the GMB were primarily concerning the appointment of Ms Hill QC to act as the investigator, the DAW being the vehicle of resolution and the consolidation of all the grievances. In particular, the Tribunal had regard to the proposed outcome sought in the 2 July communication which was the appointment of somebody else and the abandonment of the current investigation. It would have been wholly inappropriate and irregular for Ms Hill

QC to adjudicate on her own appointment to do the investigation and was out with her terms of reference. That was a matter for the Trust in relation to which the Tribunal has already made its findings and conclusions. The thrust of the 27 July communication was about the alleged scope of the investigation. That was already known and clear. It did not require separate attention. The Tribunal has given extensive consideration itself in its findings above with regard to Ms Hill QC's findings in relation to the collective grievance of 12 January 2015.

(164) The Tribunal had regard to ***Pasab Ltd t/a Jhoots Pharmacy and another v Woods 2012 EWCA Civ 1578*** in which the Court of Appeal considered whether a Muslim employee, who was dismissed following her remark that she worked at a 'little Sikh club' suffered unlawful discrimination. The Court of Appeal upheld the EAT which had allowed the employer's appeal against a finding of unlawful victimisation. The EAT focused on the "reason why" Mrs Woods was dismissed. It pointed out that the Tribunal accepted that the true reason for dismissal was Mrs Jhooty's belief that Mr Woods had made a racist comment. In the EAT's view, it was not open to the Tribunal, having accepted this, to impute some different reason to Mrs Jhooty based on its own assessment of the meaning of Mrs Woods' remark. The EAT concluded that if the remark was viewed by Mrs Jhooty not as a protected act but as an offensive racist comment, then the reason for dismissal was not that Mrs Woods had done a protected act, "but some other feature genuinely separable from the implicit complaint of discrimination". The Court of Appeal upheld the EAT's decision. The Court held that, in effect, the Tribunal found that Mrs Woods was dismissed because Mrs Jhooty believed she had made a racist remark. In a strict causative sense, Mrs Woods was dismissed because she made a remark which the Tribunal considered objectively to be a complaint of discrimination. However, the protected act was not the reason why Mrs Jhooty acted as she did. Hallett LJ stated:

"*I fail to see how it can be said that the reason why the appellant was dismissed was because she was claiming the respondents were themselves racist or discriminatory. It was the other way round. The appellant was dismissed because it was thought she was a racist. A "protected act" played no part, certainly no substantial part in the dismissal."*

(165) It appeared to the Tribunal that this case was on all fours with ***Jhoots***. Even if the claimants collective grievance did amount to a protected act, which the Tribunal have concluded it did not, it was not the reason why Ms Hill QC found as she did.

(166) In relation to the communications of 2 and 27 July 2015, there was no detriment to the claimants, thus the burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied the protected disclosure did not materially influence the respondent's (or Ms Hill QC's) decision . The burden of proof did not shift for the victimisation claim as there was no detriment; alternatively, the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondents explanation was cogent and in no sense whatsoever because of a protected act.

(167) In relation to the collective grievance, there was a detriment to the claimants – the outcome of Ms Hill QC's investigation. If the Tribunal had concluded that there was a protected disclosure or a protected act, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for victimisation claim as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation (via Ms Hill QC too) was cogent and in no sense whatsoever because of a protected act.

Issues 5, 38 and 71

(168) This was withdrawn during the Hearing. Accordingly no conclusions were made.

Issues 6, 39 and 72

(169) In the light of the findings above, the reason why the respondent subjected the claimants to a MHPS investigation was not the claimants' race; or that they had made a protected disclosure or that they had done a protected act. It was because they were considered to have a case to answer based on Ms Hill QC's investigation outcome; their multiple refusals to engage in that process; and as a consequence the belief that they were in breach of their implied duty of trust and confidence which could amount to a breakdown in the employment relationship (Mr Altman's letter of 18 January 2016, pages 626-629). This was clearly a position the respondent could take on the evidence available at the time. The claimants could have participated in the investigation, in protest, and/or made their position known on it concurrently and reserved their position on any consequential outcome and go through an appeal process against the outcome. They opted to do none of this. Part of the process flowed from the claimants' own initiation of a complaint. It is not uncommon for a party who is being investigated to disagree with many aspects of the process or even the basis of an allegation being made, but it is not an answer to refuse to cooperate or participate. In so far as the claimants felt justified in not taking part, the consequential response from the respondent in relation to that decision was not, in the Tribunal's view, based on any prohibited ground.

(170) There was a detriment to the claimants – the instigation of an MHPS investigation. If the Tribunal had concluded that there was a protected disclosure or a protected act, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 7, 40 and 73 and issues 8, 41 and 74 and issues 22, 55 and 88

(171) In the light of the findings above, (in particular paragraphs 64-70), the reason why the claimants were denied the right to be accompanied at the MHPS investigation by Mr Elesinnla, a barrister, was not the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The respondent's applied a reasonable interpretation of their policy, with regard to Kulkarni and were entitled to form a view that Mr Elesinnla was a privately retained barrister first. The primary relationship was not that of a friend. The Tribunal concluded that the respondents reference to and reliance on Mr Elesinnla's previous retainer since 2008 by the claimants in multiple litigation against the Trust was about the fact of litigation and Mr Elesinnla's legal capacity, rather than anything to do with the nature of those claims. The Tribunal did not need to make any further conclusions, its analysis in its findings above was comprehensive in this regard. The Tribunal noted its finding regarding the respondent's reference to a white consultant (Mr Hale) who had been similarly denied a private lawyer to accompany him (pages 484-485) in reaching its conclusion. The grievance and appeal against the grievance outcome did not alter the Tribunal's view. On the contrary, it manifested an interpretation of the policy by multiple individuals up to and including Mr Viggers who presided over the appeal against dismissal. There was nothing preventing any individual from reaching a contrary view. That the claimants believed that the individuals were not independent or were furthering a racist agenda was rejected. The Tribunal will address this specifically later.

(172) There was no detriment to the claimants, as they were seeking legal representation beyond what was permitted. Thus the burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision . The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 9, 42 and 75

(173) In the light of the findings above, the reason why the respondent continued with the MHPS investigation whilst the County Court claim remained outstanding, was not the claimants' race; or that they had made a protected disclosure or that they had done a protected act. It was because the respondent wished to continue with their internal process, in circumstances where there had been no legal interference with their right to do and because there had already been a protracted grievance and grievance appeal process which had concluded in relation to the right to be accompanied. Whether it was reasonable or unreasonable to do so (in the sense of it being within the range of reasonable responses) was not the test or informative of whether a prohibited reason (protected disclosure, race or a protected act) was causative of that decision. The County Court claim was issued on 22 December 2016. The claimants had not sought declaratory, not injunctive relief. As found above, the County Court Judge who heard the injunction application on 19 September 2017 (the day

before the disciplinary hearing) was critical of the delay (on part of the claimants). The Judge was similarly critical of the delay at the final Hearing in January 2018. There was no relevant activity between January 2017 and 21 July 2017 which the Tribunal were taken to regarding prosecution of the County Court claim or the imminence of a Trial. This was the period in which the MHPS investigation was resumed and concluded (by Dr Maccario's letter of 12 July 2017 (page 860). The Tribunal had regard to the fourth bullet on page 311 which stated that the employing Trust squarely had responsibility for the disciplining of its medical staff and dentists – not outsiders (MHPS). This was addressed by Dr Findlay in paragraph 49 of his witness statement too.

(174) There was no detriment to the claimants, as they could and should have sought injunctive relief a lot earlier during the currency of the resumption of the investigation process. They were to blame in this regard. In fact they sought injunctive relief after the investigation process had closed and the matter had moved to a disciplinary hearing. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision . The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 10, 43, 76

(175) In the light of the findings above, the investigation process was reasonable. Alternatively, the reason why the respondent undertook the investigation in the manner and nature in which it did, in so far as it might not have been reasonable, was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The claimants had been invited to meet with Mr Maccario. They refused because of the County Court claim but as noted above did nothing more at that time. Mr Carter, who became the case manager when Mr Altman left, revisited but refused Mr Elesinnla accompanying the claimants (page 850). The Tribunal noted that one of the signatories to the collective grievance was a nurse who had received a final written warning and had appealed the sanction. At her hearing, she was accompanied my Mr Rufus George of GMB. The Tribunal concluded that the claimants could have attended the investigation hearing, under protest if they so wished and considered attending with Mr George. As found above, Mr Maccario felt hampered by the non-attendance/participation in the investigation process by the claimants. He had considered Ms Hill QC's report with appendices and there was nothing improper or unreasonable in his investigation considerations. As found above in paragraph 75, to the extent that he endorsed Ms Hill QC's findings was permissible. There was no reason to render redundant a comprehensive investigation. The Tribunal concluded that Mr Maccario would have listened to any challenge or criticism of the findings and reached his own conclusion. As found in paragraph 76, his knowledge was good enough.

(176) There was no detriment to the claimants in relation to the reasonableness of the MHPS investigation. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision . The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issue 11, 44 and 77 and 12, 45 and 78

(177) In the light of the findings above, Dr Findlay was not prejudiced towards the claimants before he chaired the disciplinary hearing and did not make derogatory remarks about the claimants. The reason why he made enquiries of the O&G department and made reference to Mr Kalu being difficult was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason was because he had read the 2016 CQC report and had become aware, before taking over the management of the Trust (April 2017), that there was a culture of grievances generally and because he had been informed that the claimants were going through a MHPS process. The Tribunal concluded that he would have been told in outline the case against them (including that there were discrimination allegations from the claimants) and that his reference to being difficult was in relation to their non-cooperation and non-participation in the process and their insistence on having Mr Elesinnla accompany them at the MHPS investigation. The Tribunal concluded that the CQC report was not complete. Only some of the pages were in the bundle but there was general reference to a grievance culture in parts of the report – pages 1987, 1993. In addition the Tribunal accepted the testimony of Dr Findlay in this regard. The Tribunal has already made findings in paragraph 88 about any variance between the notes of Ms Farmer (and her the evidence) and the notes of Ms Brown admitted on day one of the Hearing. GMC check

(178) There was no detriment to the claimants in relation to Dr Findlay's enquiries in April 2017. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 13, 46 and 79

(179) In the light of the findings above, the reason why the respondent pursued allegations against the claimants for their failure to participate in Ms Hill QC's investigation was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was

because the claimants had refused, in breach of an express mutual trust and confidence clause (page 463) and the mirroring implied duty, to comply with numerous reasonable instructions to do so. It was no answer that the claimants did not agree with Ms Hill's appointment or the consolidation of multiple grievances. The allegations of discrimination post-dated the last request/instruction. The forum to make their positions known was in the procedure itself and in the right of appeal against it and whether under protest or otherwise. The Tribunal found the investigation under the DAW, the appointment of Ms Hill QC and the consolidation of all interlinked grievances outstanding to be reasonable. There were five instructions or requests to participate between 2 June and 22 June 2015 (pages 525, 540, 549, 550 and 552). At least three of these letters were framed as instructions to cooperate. The Tribunal had regard to the claimants own collective grievance being in the scope of the investigation, which the claimants considered to be a serious complaint of discrimination; as such it was incumbent on the claimants to cooperate in its resolution even if they had concerns with process.

(180) There was a detriment to the claimants – the pursuit of allegations relating to the failure of the claimants to cooperate with/participate in Ms Hill QC's investigation. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 14, 47 and 80 and 15, 48 and 81 and 20, 53 and 86

(181) In the light of the findings above, the reason why the respondent continued with the disciplinary process notwithstanding the claimants' email of 13 September 2017 was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why the respondent continued was because the issues raised were considered part and parcel of the disciplinary process itself with the exception of the allegations made regarding Dr Findlay which were investigated by Ms Farmer and resolved to her satisfaction and of Ms Griffiths such that there was no reason to suspend the disciplinary process. The Tribunal has found the respondent's approach was reasonable and open to it (paragraph 83) and has reached findings and conclusions regarding the failure to seek injunctive relief sooner in relation to the MHPS investigation. The Tribunal had regard to the history of the processes to date which included the hearing of the grievance about the right to be accompanied and the appeal against it.

(182) There was no detriment to the claimants in relation to continuance of the process - once Ms Farmer had undertaken her enquiries. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The

burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 16, 49 and 82

(183) The Tribunal repeats its conclusions under issues 9, 42 and 75 above with regard to the MHPS investigation which had preceded the disciplinary hearing. In addition, In the light of the findings above, the reason why Dr Findlay refused to adjourn the disciplinary hearing was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why he refused was because of the findings above in paragraphs 96 and 97 namely that Dr Findlay noted that there had been no court (injunctive) intervention; it was for the Trust to manage its own procedures; the matter was considerably long-standing; Dr Findlay's own interpretation of the right to be accompanied provision. The Order of the County Court was to request an adjournment only couched in terms that the application had been made very late.

(184) There was a detriment to the claimants – the disciplinary hearing was not adjourned. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 17, 50 and 83

(185) In the light of the findings above, the reason why Dr Findlay dismissed the claimants was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The Tribunal concluded the reason why Dr Findlay dismissed the claimants were as set out in the Tribunal's findings in paragraph 95 above namely that the charge of victimisation was upheld which he considered to be bad faith; the charge of repeated refusal to comply with instructions to cooperate in the Ms Hill QC investigation was upheld – which were gross misconduct individually or together and the latter was also was a breach of mutual trust and confidence which had led to a breakdown in the employment relationship. Notwithstanding the claimants' absence, Dr Findlay undertook his responsibility comprehensively, including questioning Mr Carter and Mr Maccario and anticipating questions that may have arisen from the claimants. The Tribunal concluded that Dr Findlay acted with independence of mind and reached his own view in relation to the motive for the collective grievance. Contrary to the assertions about Dr

Findlay's agenda, he was new to the Trust, since the takeover, he had no personal knowledge of the claimants nor could be said to be dwelling on the historical issues/processes since 2014.

(186) There was a detriment to the claimants – the claimants were dismissed. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim, as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 18, 51 and 84

(187) In the light of the findings above, the reason why Dr Findlay was discussing replacements for the claimants, following their dismissal, was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because the claimants had been dismissed and Dr Findlay was discussing the consequential clinical gap in the O&G department. This meeting was on 30 September 2017. The Tribunal refers to its findings in paragraphs 114 and 115 above. The Tribunal noted that neither Mr Kelada nor Ms Brown were called to give evidence. The Tribunal concluded that it was incredible and not plausible that Dr Findlay would speak about the claimants' appeal process in such terms and in such unguarded detail so soon afterwards. The comments attributed to Dr Findlay by Mr Kelada (as conveyed by Mr Kalu), referred to what would happen if there were Employment Tribunal proceedings; that there were 'other ways' available to the Trust if a Tribunal ruled dismissals unlawful and that the Trust could insist on trust and confidence having broken down irretrievably. This summary was notably different to what Ms Brown was alleging who stated that Dr Findlay had said if an appeal was successful, the Trust did not need to reinstate. The Tribunal relied on the contemporaneous denial of comments attributed to Dr Findlay and his rejection in oral testimony. This was accepted. In evidence, Dr Findlay also informed the Tribunal that shortly before the Tribunal Hearing, Ms Brown had been demoted; the Tribunal thus factored in and concluded there was an incentive for her to give/make available a statement of unfavourable evidence against the respondent. This evidence was not contested and she was not present to provide a contrary explanation or be questioned. The statement relied on by the claimants was served extremely late, it was unsigned and was not contemporaneous. The Tribunal also had regard to its finding (paragraph 101) that Dr Findlay did not refer the claimants to the GMC until after the appeal hearing suggesting that there was no fait accompli. The contemporaneous dialogue about this had been transparent.

(188) There was no detriment to the claimants in relation to Dr Findlay's discussions with the O&G department regarding resourcing after the claimants' dismissals. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal

was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 19, 52 and 85

(189) In the light of the findings above, the reason Mr Viggers was appointed to chair the appeal hearing was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why he was appointed was because he was independent, senior and experienced. He was the Chair of the Board, the most senior person in the Trust. He had 50 years working experience and had previously overturned dismissals on appeal. None of this evidence was disputed or challenged. With regard to the findings in paragraphs 104, 109 and 110 above in particular, there was no legitimate basis upon which to challenge his appointment. If the premise was that he had been copied in to an email of 13 September 2017 with two others and three others to whom the email was directly addressed, this was wholly insufficient. There was no information or evidence at all before the Tribunal that he had anything more to do with it other than receiving and reading the email. In addition, it did not provide a warrant for a scathing attack on his intellect or justify the far reaching accusations of racism in very distasteful language or tone. They had no knowledge of his background. The Tribunal found Mr Viggers to be a very credible witness who had a genuine intention to resolve the appeal objectively. He was not given a chance. The Tribunal recognised that this was a stressful period in the claimants' life; notwithstanding, the emails about Mr Viggers were not written in the heat of the moment or in close proximity to their dismissals. This issue was solely about the appointment of Mr Viggers. It should never have been an issue in this case.

(190) There was no detriment to the claimants in relation to the involvement or appointment of Mr Viggers to chair the appeal. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 21, 54 and 87

(191) In the light of the findings above, the reason why the claimants were not supplied with all of the documentation before the appeal hearing was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The Reason why they did not receive all of the documentation (limited to the notes of Ms Farmers discussions with Mr

Ajala and Ms Brown) was a genuine oversight. It had always been stated that there were discussions/notes and that they would be sent. The respondent had not been ambiguous or evasive about whether there were notes. The Tribunal had regard in particular to its findings in paragraph 106 above, Ms Griffiths email at page 925 and Ms Farmer's cross examination. It was only these documents that had not been provided sooner. The Tribunal concluded that this would have been realised a lot sooner had the claimants attended the disciplinary hearing with Dr Findlay. It was inevitable this would have been challenged and discussed then. Also, this agreed issue was framed in a way which could have led the Tribunal to conclude that there was nothing adverse at all on the part of the respondent. This is because the issue was about whether the respondent had failed to provide documents prior to or during the appeal hearing. They were presented during the appeal hearing; but the claimants were not present. The Tribunal nevertheless decided the issue on the basis of whether documents had been provided before as it was felt this was the actual intention of the issue.

(192) There was a detriment to the claimants – the claimants had not received Ms Farmer's notes before the appeal hearing. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim and victimisation claim, as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondents explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act. Unreasonableness in relation to the late provision of the notes was not a basis upon which to decide that the respondent's explanation was tainted by discrimination at all.

Issues 23, 56 and 89

(193) In the light of the findings above, relevant questions were asked of Dr Findlay at the appeal hearing. To the extent that the questions were either not relevant or that further relevant questions ought to have been asked, the reason why was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because the claimants had not attended the appeal hearing or provided a list of questions they wished for the appeal panel to put to Dr Findlay. As found above (paragraph 113 and 114), the appeal panel did question Dr Findlay at the appeal hearing. In fact Dr Findlay responses to each appeal ground and the points raised in the email of 10 April 2018 was the substance of the appeal process. It was through the appeal questions and answers that it was realised that Dr Farmer's notes of discussions with Mr Ajala and Ms Brown were not before the appeal panel.

(194) There was no detriment to the claimants in relation to the questioning of Dr Findlay at the appeal hearing. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not

materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 24, 57 and 90

(195) In the light of the findings above, the failure to ask relevant questions of the claimants including about their written submissions was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because the claimant's did not attend the appeal hearing; they had known since Mr Viggers' letter of 16 March 2018 that Mr Elesinnla would not be permitted to attend the hearing as their accompanying companion; thus, it was incumbent on the claimants, if they so wished, to send in any (other) written submission they wanted the appeal panel to consider. They did not do so. They had made it clear in their grounds of appeal that they would not attend any appeal hearing without Mr Elesinnla. The reference in the claimants' email of 9 April 2018 to put questions to them in writing and that they would do our best to respond was too little too late. Alternatively, the email itself with 20 numbered points served as their additional appeal comments over and above the grounds of appeal and were addressed in the appeal hearing and considered and referred to in the appeal outcome letter. So were the claimants' draft particulars of claim to the Tribunal.

(196) There was no detriment to the claimants in relation to the failure to ask the claimants relevant questions including about their written submissions. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 25, 58 and 91

(197) In the light of the findings above, there was no failure to address points made by the claimants in their 'witness' submissions', which the Tribunal understood to be the email of 9 April 2018. Alternatively, if there was any failure in this regard, it was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because the appeal panel considered the contents of the appeal of 9 April 2018 and chose to address them in summary terms in the appeal outcome letter. They were considered in sufficient detail with Dr Findlay's responses at the appeal hearing. The appeal panel also considered there was an overlap between the 9 April 2018 email and the originating five grounds of appeal. Mr Viggers' witness statement addressed the broad consideration of the 9 April

2018 email too including as part of the appeal panel forum (paragraphs 11 to 16). This approach was an enforced substitute (on the respondent) to the claimants' personal attendance which was likely to have provided them with more specificity.

(198) There was no detriment to the claimants in relation to the points in their email of 9 April 2018. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 26, 59 and 92

(199) In the light of the findings above, the failure to interview witnesses was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because Mr Viggers and the other members of the appeal panel did not feel it necessary to do so. There was an examination of Dr Findlay's response to the appeal grounds directly with Dr Findlay at the hearing. No witnesses had been identified by the claimants who should be spoken to. Neither did the claimants attend the appeal hearing. The appeal documentation which the panel had been provided was comprehensive. The only documentation not seen was the notes of Ms farmers discussions which were provided during the course of the hearing.

(200) There was no detriment to the claimants in relation to the failure to interview witnesses. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 27, 60 and 93

(201) In the light of the findings above, allowing Dr Findlay to produce evidence during the course of the appeal hearing (Dr Farmer's notes) was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because it became apparent to the appeal panel that they did not have these notes and they were considered relevant to review. Consideration of Dr Findlay's discussions shortly after taking over management of the Trust had not been unaddressed or avoided until then, in fact it was the probing of that issue that led to the realisation that the appeal panel did not have the notes.

(202) There was no detriment to the claimants in relation to permitting Dr Findlay to produce the notes at the hearing. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 28, 61 and 94

(203) In the light of the findings above, the delay in conveying an appeal outcome by one working day was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because this was the earliest Mr Viggers and the appeal panel could do so. There had been emails received from the claimants after the appeal hearing too. The delay of one day was de-minimis especially having regard to the context of the formal processes over the previous 3 years. In addition, the claimants had abandoned any pursuit of alleged delay with regard to commencement of the investigation and the conclusions in relation to Ms Hill QC's investigation. In the light of that, this issue was somewhat surprising and felt like an unnecessary targeting of Mr Viggers.

(204) There was no detriment to the claimants in relation to the timing of the appeal outcome. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 29, 62 and 95

(205) In the light of the findings above, the appeal hearing was not a rubber stamping exercise or a sham. Alternatively, to the extent that there was any insufficient enquiry or understanding on part of the appeal panel, this was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because the claimants did not attend the hearing. There were 3 people on the panel, all independent. Many questions were put to Dr Findlay relating to the grounds of appeal and the email of 9 April 2018. The Tribunal has already found above (paragraph 110) that Mr Viggers was acting with objectivity and his evidence in this regard was completely credible.

(206) There was no detriment to the claimants in relation to the appeal hearing deliberations. The burden of proof (protected disclosure) did not shift. If it did,

the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 30, 63 and 96

(207) In the light of the findings above, the reason why the appeal hearing notes were not provided to the claimants sooner than 26 April 2018 was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because that was the soonest date they could be reasonably transcribed and sent to the claimants. The appeal outcome letter had made it clear that the notes would follow.

(208) There was no detriment to the claimants in relation to receiving the appeal hearing notes on 26 April 2018. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 31, 64 and 97

(209) In the light of the findings above, the reason why Dr Findlay referred the claimants to the GMC was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why was because, following discussions with the Employee Liaison officer whose responsibility included advice on GMC referrals, it was felt appropriate to do so. The Tribunal noted that Dr Findlay, at the time, had himself suggested that any such referral was delayed until the appeal process had been concluded. In the Tribunal's view, this was to avoid an unnecessary referral. Further, Dr Findlay had made it clear that there were no clinical concerns or restrictions in place. In proactively/expressly saying this, the Tribunal concluded he was being transparent and objective when responding to Mr Cotton (980). The Tribunal saw evidence that two white doctors had been referred to the GMC – one was a self-referral (page 480A), the other was a referral by complainants of the doctor (page 470A & 483A). In both cases, a referral by the Trust was not, thus, required. There was no evidence before the Tribunal, that had it not been for the manner or source of these referrals, that the Trust would not have referred them. The Tribunal concluded, following its analysis of the content and the other documents referred to in his paragraph, the comparator examples at pages 1122 and 1127 in the Bundle ('6' and '7') referred to Mr Howell and Mr Hale respectively who had both been dismissed for gross misconduct (discrimination). In cross examination, it was put to the claimants if

they were aware that one had self-reported, the other by the complainants of him. This evidence was not disputed or challenged by the claimants. In evidence, Dr Findlay referred to his knowledge of a white female who had been referred to the NMC which was consistent with the nurse dismissed for gross misconduct for discrimination (page 1085 – 1094) comparator ('2').

(210) There was a detriment to the claimants – the claimants were referred to the GMC following their unsuccessful appeals against dismissal. If the Tribunal had concluded that there was a protected disclosure, the burden of proof would have shifted to the respondent. If it did, based on its findings, conclusions and analysis above, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim and victimisation claim, as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 32, 65 and 98

(211) In the light of the findings above, Dr Findlay did not seek to deliberately mislead the GMC by not providing the pleadings in the case, the GMB grievances of 2 and 27 July 2015, the collective grievance of 12 January 2015 and the grievance of 13 September 2017. In so far as the initial provision of documents was concerned, the decision to provide 'just' those, was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The referral process was not a one sided affair, the claimants would have a full right of reply. Dr Findlay provided the MHPS report (which itself included Ms Hill QC's report with appendices (page 861). It was not however clear from the referral document whether each and every appendix and the documents therein were provided at the same time. The emails of 2 July and 27 July 2015 were part of the investigation correspondence of Ms Hill QC's report, appendix 5 (pages 1902 and 1935) (IC 106 & IC 139 respectively).The collective grievance of 12 January 2015 was at pages 1167 & 1187. However, further documents were sought from the respondent by the GMC by its email of 17 July 2018 (pages 1051-1052), by reference to the Management case report of 11 September 2017 which referred to documents from appendices in its footer. Such a request was inevitable – it seemed highly improbable that a complete set of documents could be provided once and exclusively. The appeal outcome letter for example referred to the claim form (to the ET) though it was not provided. There was no intention to mislead and it is hard to imagine how this could be possible when the documents that were provided initially referred to the other documents which were later sought and provided. The reason why the documents listed at 1 to 8 in the referral document were provided was to give a comprehensive overview. These documents included key documents at each stage - namely the investigation report, the dismissal letter and the appeal outcome. It also appeared to the Tribunal that part of the claimants' concerns were actually about their belief that the GMC was a racist organisation, rather than the extent

of documentation initially provided (7 June email, page 1046), repeated later on 5 December 2018 (page 1063).

(212) There was no detriment to the claimants in relation to the extent or 'choice' of documentation provided at the referral point to the GMC. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Issues 33, 66 and 99

(213) In the light of the findings above, the comments made by Dr Findlay and Ms Griffiths on 28 March 2017 at a presentation to senior leaders of the Trust was not because of the claimants' race; or that they had made a protected disclosure or that they had done a protected act. The reason why the comments were made was because they had read the 2016 CQC report and had believed there were cultural issues and a disproportionate level of formal grievances and disciplinary procedures. The evidence of Dr Findlay in paragraphs 93 to 96 in his witness statement was corroborated by Ms Griffiths paragraphs 6 to 8. The comments were about the forum and timing of resolution not about the entitlement to raise concerns. There was no evidence before the Tribunal that the comments were in relation to the BME network or about discrimination grievances. The claimants were not present at this meeting and no-one present at this meeting was called to give contrary evidence**.**

(214) There was no detriment to the claimants in relation to the comments of Dr Findlay and/or Ms Griffiths in March 2017. The burden of proof (protected disclosure) did not shift. If it did, the Tribunal was satisfied a protected disclosure did not materially influence the respondent's decision. The burden of proof did not shift for the direct race discrimination claim or victimisation claim (in so far as there was any detriment) as the facts were wholly insufficient from which the Tribunal could conclude an unlawful act of discrimination. If the Tribunal was wrong about that, the respondent's explanation was cogent and in no sense whatsoever because of the claimants' race or a protected act.

Unfair Dismissal

(215) Having regard to the findings and conclusions above, the Tribunal concluded that the respondent, substantively, satisfied the ***Burchell*** test in relation to its decision to dismiss the claimants. The respondent had a genuine belief in the claimants' misconduct, it had reasonable grounds on which to hold that belief and it carried out as much investigation as was reasonable. Alternatively, that the employment relationship had broken down irretrievably which was a substantial reason.

(216) Its decision to dismiss the claimants was, substantively within the range of reasonable responses open to it.

(217) However, procedurally, the Tribunal concluded there were two shortcomings. First, in relation to the provision of Ms Farmer's notes. These were not produced (for inspection) until the appeal hearing and were sent on to the claimants thereafter. The respondent had itself identified that an investigation was needed in relation to what was the subject matter of those notes – Dr Findlay's comments earlier in the year to named individuals. The claimants had requested them more than once and were told these would be forthcoming. The notes went to their view of whether Dr Findlay should undertake the disciplinary hearing.

(218) In addition, the Medical Director (Dr Findlay) was not involved at the investigation stage as the Case Manager. The MHPS investigation procedure (1.5) on page 290a states that the Medical Director will act as case manager in cases involving clinical consultants. The power to delegate was only possible in 'other' cases. However, Dr Findlay did become involved at the subsequent (disciplinary) stage. In so far as this error was about appropriate senior involvement, this did occur at the next stage and cured, in the Tribunal's conclusion, any earlier procedural irregularity in the same way as an appeal curing a earlier defect at dismissal. It was not the case, quite obviously, that the process would have been 'stopped' at an earlier stage by his earlier involvement. The Tribunal thus concluded this error did not render the dismissal unfair.

(219) The Tribunal did however conclude that the dismissal was rendered procedurally unfair because of the defect with the late provision of Ms Farmer's notes.

(220) With that conclusion in mind and even if the Tribunal was wrong with regard to its conclusion in paragraph 218 above, the Tribunal went on to consider whether a ***Polkey*** reduction should be made to the compensatory award and concluded that a 100% reduction should be made. There was no prospect whatsoever, having regard to the above findings and conclusions, that earlier provision of Ms Farmer's note would have made any difference to the outcome. The claimants would still not have attended any hearing; they would still have insisted on Mr Elesinnla accompanying them and they would still have criticised the involvement of both Dr Findlay and Mr Viggers. They would have said nothing different (save in relation to the absence of the notes). The theme and pattern of their entrenched position would have remained. It was set in stone.

(221) Additionally/alternatively, under S.123 (2) ERA, pursuant to the claimants conduct before their dismissal, in particular because of the finding of victimisation made herein and also because the Tribunal concluded that the claimants persistent refusal to cooperate and participate was insubordinate and unreasonable - they had refused to obey reasonable management instructions to do so, it was not just and equitable for a basic award to be payable. It is reduced by 100%. The Tribunal also concluded it was not just and equitable to

make any compensatory award under S.123 (6) ERA as the claimants' conduct caused or contributed to their dismissal – it was culpable and blameworthy.

(222) For the avoidance of doubt and again by reference to the findings and conclusions above the claim under S.103A is not well founded. The (alleged) protected disclosure (s) was not the reason or principal reason for the claimants' dismissals.

Wrongful Dismissal

(223) The Tribunal also concluded that the claimants were in fundamental breach of contract because they had discriminated (victimised) Ms Burns and because the Tribunal was satisfied that the claimants had persistently refused to cooperate and participate in Ms Hill QC's investigation which was insubordinate and unreasonable. They had refused to obey reasonable management instructions to do so.

(224) The Tribunal concluded there was no affirmation of the breach of contract. The assertion that the respondent did not reserve its position to take disciplinary action following the claimants' appeals against Ms Hill QC's investigation outcome being dismissed on 6 November 2015 was flawed. In those letters, the respondent wrote, expressly, that they would write to the claimants about what action, if any, would be taken in the light of Ms Hill's investigation findings (page 620). The subsequent MHPS investigation commenced on 18 January 2016.

Jurisdiction

(225) The claim forms were presented on 29 September 2017. There was no ACAS certificate in the bundle. It is possible the claim form was accepted as an interim relief claim only (although the claim form read wider than that). The point was not taken or addressed by either party.

(226) As such, allegations of discrimination or protected disclosure detriment predating 30 June 2017 were, prima facie out of time.

(227) That put a large number of the claims out of time with the exception of the MHPS investigation report of Mr Maccarrio, the dismissal (and related issues) and the appeal against dismissal (and related issues) were in time (following amendment).

(228) The Tribunal considered if the allegations since the decision to treat the collective grievance of 12 January 2015 as part of a single investigation with other grievances (on 2 June 2015) to the appeal outcome could be considered conduct extending over a period of time.

(229) Whilst the decisions and actions in that period were taken by various/separate senior managers, including a third party, independently of each other including by some individuals the claimants had never met/did not know, there was a sufficient link between them to make it a continuing state of discriminatory affairs. However in ***South Western Ambulance NHS Foundation Trust v***

King 2019 UKEAT 0056, it was said if any of the constituent acts are found not to be an act of discrimination, then it cannot be part of a continuing act. The EAT said in paragraphs 23, 33 and 37:

"23. Given that the time limits are such as to create a jurisdictional hurdle for the Claimant, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time.

33. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory.

*37. That analysis seems to me to be supported by the conclusions reached by the EAT in the **Jhuti** case where it was held that:*

Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes ." (Emphasis added)

(230) The final act and none of those earlier acts have been found to be discriminatory at what was a final hearing of the issues. Accordingly the continuing act was not made out. On that basis, it was not necessary to decide if it is was just and equitable (discrimination) to extend time, or if it had been reasonably practicable (protected disclosure) for claims to have been presented within three months as there were no discrimination or detriment claims proven/made out in respect of which any discretion needed to exercised.

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Employment Judge Khalil

26 February 2021

APPENDIX 1 AGREED LIST OF ISSUES (RED FONT SHOWS CLAIMANTS' ADDED NARRATIVE)

Whether the following constituted "protected disclosure and/or a protected act" as provided by sections 43A and 43B Employment Rights Act 1996 and section 27 Equality Act 2010

- The collective grievance invoked by the BME group dated 12th January 2015,
- The collective grievance invoked by the BME group dated 26th June 2015, and Cs' refusal to participate in the Hill investigation
- The GMB grievance dated 3rd July 2015 and
- The GMB grievance dated 27th July 2015
- The BME Network's complaints to:

- Mr Simon Stevens
- Mr Bob Alexander
- The CQC
- Members of Parliament
- The vote of no confidence in or around October 2015.
- The petition against the R's management and accompanying fact sheet setting out instances of racial discrimination in the R

I. Detrimental treatment and dismissal (race discrimination)

1. The R's decision that the 12th January 2015 collective grievance should be investigated alongside other matters as part of a single investigation under the R's Dignity at Work Policy and Procedure and not under the R's grievance procedure, as agreed by Mr Kershaw in his email dated 16 January 2015.

2. The R appointing Ms. Hill QC to act as investigator replacing Mr Albert Rose on racial grounds without consulting with the Cs and without their prior agreement,

~~3. Ms Hill QC's failure to make reference to the grievances raised by the Cs of 3rd July 2015 and 27th July 2015, and her failure to identify them as a protected act and/or protected disclosure.~~

~~4. Ms. Hill QC's findings in relation to the collective grievance of 12th January 2015, and her failure to identify the same as a protected act and/or a protected disclosure~~

5. The R delaying the commencement of the investigation and delaying its conclusions, and the fact that Ms Burns was allowed to have her partner, Ms Katie Parker, and a union representative to represent her during the Hill and Hann investigations and the failure to inform the BME employees of this arrangement and/or the failure to offer them the same privileges.

6. The R subjecting the Cs to an MHPS investigation when the R did not believe they had committed any act of misconduct,

7. The R denying the C's representation by Ayoade Elesinnla, a barrister, because he had represented them in litigation alleging a contravention of the equality Act 2010

8. The R not upholding the Cs grievance about their right to representation by Mr. Elesinnla, a barrister,

9. The R continuing with the MHPS investigation despite the Cs seeking an adjudication in the County Court on their right to representation, and being aware as early as July 2017 that a trial window had been set for around September/October 2017,

10. The R's failure to carry out a reasonable investigation,

11. Dr. Findlay being biased against Mr. Kalu and Mr Ogueh prior to the disciplinary hearing, and contacting the GMC whether through its ELA or directly as early as April 2017 with a view to referring them to the GMC at a time when the investigation into their alleged misconduct had not even started.

12. Dr. Findlay making prejudicial remarks about Mr. Kalu prior to the disciplinary hearing

13. The R pursuing allegations related to the Cs failure to participate in the investigation of Ms. Hill QC,

14. The R continuing with a disciplinary process despite the C's grievance on 13th September 2017, and the failure to investigate the grievance properly or at all in accordance with its own grievance procedures and/or DAWP procedures

15. The R requesting the Cs attend a disciplinary hearing of 20th September 2017 and raise the concerns set out in the grievance of 13th September 2017 with Dr. Findlay who was chairing the disciplinary hearing,

16. Dr. Findlay refusing to adjourn the disciplinary hearing despite the fact that he was aware of the grievance against him and the fact that HHJ Simpkiss of the Brighton County Court had ordered that the Cs should attend the disciplinary hearing to request an adjournment, and insisting that Mr Kalu should continue with the hearing without representation,

17. Dr. Findlay dismissing the C,

18. Dr. Findlay ~~suggesting~~ approving substantive replacements for the Cs could be recruited in the days following the disciplinary hearing, discussing the Claimant's dismissals with their colleagues and informing them that they would not be returning irrespective of the outcome of any court proceeding,

19. Mr. Viggers involvement as chair of the appeal hearing,

20. Failure to take action to ensure the Cs grievance of 13th ~~December~~ September 2017 was dealt with, in accordance with the Respondent's grievance procedures and/or any recognised appropriate industrial relations practice bearing in mind one of the people against whom a complaint was made was the chief executive,

21. Failure to provide all relevant documents to the Cs prior to or during the appeal, in breach of the Respondent's disciplinary procedure and his own assurances

22. Failure to agree that Mr. Elesinnla could act as the Cs companion in the appeal, and deliberately misquoting Kulkarni to support his position,

23. In relation to the appeal hearing, the failure to ask relevant questions of Dr. Findlay,

24. In relation to the appeal hearing, the failure to ask relevant questions of the Cs including about their written submissions despite the Cs offering to answer any written questions,

25. In relation to the appeal hearing, the failure to address points made by the Cs in their witness submissions,

26. In relation to the appeal hearing, the failure to interview witnesses,

27. In relation to the appeal hearing, allowing evidence produced by Dr. Findlay to be admitted, without any explanation on the day of the hearing,

28. In relation to the appeal hearing, the failure to provide a written outcome within seven working days,

29. Carrying out an appeal that was a rubber-stamping exercise or a sham

30. Failure to provide the notes of the of the appeal hearing to the Cs before 26th April 2018,

31. Dr. Findlay referring the Cs to the GMC, and trying to suggest that this was only done because the ELA had advised him to do it, referring the Cs to the GMC when no other white Dr had been referred to the GMC by the Respondent in similar circumstances,

32. Dr. Findlay seeking to deliberately mislead the GMC by not providing the GMC with a balanced picture by providing the pleadings in this case, the grievances lodged by the GMB of 3rd and 27th July 2015, the collective grievance of 12th January 2015 and the grievance of the Cs of 13th September 2019,

33. Both Dr Findlay and Ms Griffiths telling a meeting of the BME network group that the R would not tolerate grievances or litigation brought on racial grounds

II. Detrimental treatment and dismissal (race victimisation)

34. The R's decision that the 12th January 2015 collective grievance should be investigated alongside other matters as part of a single investigation under the R's Dignity at Work Policy and Procedure and not under the R's grievance procedure, as agreed with Mr Kershaw thereby denying the Cs the ability to cross-examine Ms Burns,

35. The R appointing Ms. Hill QC to act as investigator without consulting with the Cs and without their prior agreement, despite the fact that the previous investigator, Mr Hann had been agreed by both parties,

36. Ms Hill QC's failure to make reference to the grievances raised by the Cs of 3rd July 2015 and 27th July 2015, or identify them as protected acts,/protected disclosures which amplified the Cs complaint of 12 January 2015,

37. Ms. Hill QC's findings in relation to the collective grievance of 12th January 2015, and her failure to identify the grievance as a protected act/protected disclosure,

38. The R delaying the commencement of the investigation and delaying its conclusions,

39. The R subjecting the Cs to an MHPS investigation when the R did not believe they had committed any act of misconduct,

40. The R denying the C's representation by Ayoade Elesinnla, a barrister, who it acknowledged is their friend,

41. The R not upholding the Cs grievance about their right to representation by Mr. Elesinnla, a barrister, who it acknowledged is their friend,

42. The R continuing with the MHPS investigation despite the Cs seeking an adjudication in the County Court on their right to representation,

43. The R's failure to carry out a reasonable investigation,

44. Dr. Findlay being biased against Mr. Kalu prior to the disciplinary hearing,

45. Dr. Findlay making prejudicial remarks about Mr. Kalu prior to the disciplinary hearing

46. The R pursuing allegations related to the Cs failure to participate in the investigation of Ms. Hill QC,

47. The R continuing with a disciplinary process despite the C's grievance on 13th September 2017,

48. The R requesting the Cs attend a disciplinary hearing of 20th September 2017 and raise the concerns set out in the grievance of 13th September 2017 with Dr. Findlay who was chairing the disciplinary hearing,

49. Dr. Findlay refusing to adjourn the disciplinary hearing despite the fact that he was aware of the grievance against him and the fact that HHJ Simpkiss of the Brighton County Court had ordered that the Cs should attend the disciplinary hearing to request an adjournment,

50. Dr. Findlay dismissing the C,

51. Dr. Findlay suggesting substantive replacements for the Cs could be recruited in the days following the disciplinary hearing,

52. Mr. Viggers involvement as chair of the appeal hearing

53. Failure to take action to ensure the Cs grievance of 13th ~~December~~ September 2017 was dealt with,

54. Failure to provide all relevant documents to the Cs prior to or during the appeal,

55. Failure to agree that Mr. Elesinnla could act as the Cs companion in the appeal,

56. In relation to the appeal hearing, the failure to ask relevant questions of Dr. Findlay,

57. In relation to the appeal hearing, the failure to ask relevant questions of the Cs including about their written submissions

58. In relation to the appeal hearing, the failure to address points made by the Cs in their witness submissions,

59. In relation to the appeal hearing, the failure to interview witnesses,

60. In relation to the appeal hearing, allowing evidence produced by Dr. Findlay to be admitted,

61. In relation to the appeal hearing, the failure to provide a written outcome within seven working days,

62. Carrying out an appeal that was a rubber-stamping exercise or a sham

63. Failure to provide the notes of the of the appeal hearing to the Cs before 26th April 2018,

64. Dr. Findlay referring the Cs to the GMC,

65. Dr. Findlay seeking to deliberately mislead the GMC by not providing the GMC with a balanced picture by providing the pleadings in this case, the grievances lodged by the GMB of 3rd and 27th July 2015, the collective grievance of 12th January 2015 and the grievance of the Cs of 13th September 2019,

66. The R telling a meeting of the BME network group that the R would not tolerate grievances or litigation brought on racial grounds,

III. Detrimental treatment and dismissal (whistleblowing)

67. The R's decision that the 12th January 2015 collective grievance should be investigated alongside other matters as part of a single investigation under the R's Dignity at Work Policy and Procedure and not under the R's grievance procedure,

68. The R appointing Ms. Hill QC to act as investigator without consulting with the Cs and without their prior agreement,

69. Ms Hill QC's failure to make reference to the grievances raised by the Cs of 3rd July 2015 and 27th July 2015,

70. Ms. Hill QC's findings in relation to the collective grievance of 12th January 2015,

71. The R delaying the commencement of the investigation and delaying its conclusions,

72. The R subjecting the Cs to an MHPS investigation when the R did not believe they had committed any act of misconduct,

73. The R denying the C's representation by Ayoade Elesinnla, a barrister,

74. The R not upholding the Cs grievance about their right to representation by Mr. Elesinnla, a barrister,

75. The R continuing with the MHPS investigation despite the Cs seeking an adjudication in the County Court on their right to representation,

76. The R's failure to carry out a reasonable investigation,

77. Dr. Findlay being biased against Mr. Kalu prior to the disciplinary hearing,

78. Dr. Findlay making prejudicial remarks about Mr. Kalu prior to the disciplinary hearing

79. The R pursuing allegations related to the Cs failure to participate in the investigation of Ms. Hill QC,

80. The R continuing with a disciplinary process despite the C's grievance on 13th September 2017,

81. The R requesting the Cs attend a disciplinary hearing of 20th September 2017 and raise the concerns set out in the grievance of 13th September 2017 with Dr. Findlay who was chairing the disciplinary hearing,

82. Dr. Findlay refusing to adjourn the disciplinary hearing despite the fact that he was aware of the grievance against him and the fact that HHJ Simpkiss of the Brighton County Court had ordered that the Cs should attend the disciplinary hearing to request an adjournment,

83. Dr. Findlay dismissing the C,

84. Dr. Findlay suggesting substantive replacements for the Cs could be recruited in the days following the disciplinary hearing,

85. Mr. Viggers involvement as chair of the appeal hearing

86. Failure to take action to ensure the Cs grievance of 13th ~~December~~ September 2017 was dealt with,

87. Failure to provide all relevant documents to the Cs prior to or during the appeal,

88. Failure to agree that Mr. Elesinnla could act as the Cs companion in the appeal,

89. In relation to the appeal hearing, the failure to ask relevant questions of Dr. Findlay,

90. In relation to the appeal hearing, the failure to ask relevant questions of the Cs including about their written submissions

91. In relation to the appeal hearing, the failure to address points made by the Cs in their witness submissions,

92. In relation to the appeal hearing, the failure to interview witnesses,

93. In relation to the appeal hearing, allowing evidence produced by Dr. Findlay to be admitted,

94. In relation to the appeal hearing, the failure to provide a written outcome within seven working days,

95. Carrying out an appeal that was a rubber-stamping exercise or a sham

96. Failure to provide the notes of the of the appeal hearing to the Cs before 26th April 2018,

97. Dr. Findlay referring the Cs to the GMC,

98. Dr. Findlay seeking to deliberately mislead the GMC by not providing the GMC with a balanced picture by providing the pleadings in this case, the grievances lodged by the GMB of 3rd and 27th July 2015, the collective grievance of 12th January 2015 and the grievance of the Cs of 13th September 2019,

99. The R telling a meeting of the BME network group that the R would not tolerate grievances or litigation brought on racial grounds

IV. Ordinary unfair dismissal

100. Was the reason for the Cs dismissal conduct or some other substantial reason, in the light of the affirmation of the contract by the R in relation to the alleged misconduct of the Cs can the R establish a reason?

101. If so, were the dismissals fair in all the circumstances. Did the R carry out a reasonable investigation and was the dismissals within the band of reasonable responses,

102. If the dismissal of the Cs was unfair because of a procedural failure, should there be a ***Polkey*** reduction

103. Further, if the dismissal was unfair, did the Cs contribute to their dismissals by their conduct

V. Automatically Unfair Dismissal

Was the reason (or if more than one, the principal reason) for the Cs dismissal the fact that they had made protected disclosures?

V. Wrongful dismissal

104. Did the Cs conduct amount to a breach of contract entitling the R to dismiss the Cs without notice,

105. If so, did the R by its actions waive the right to rely on any breach of contract by the Cs.

VI. Jurisdiction

106. ~~Insofar as any allegations are made that the investigation by Ms. Hill QC was discriminatory, is this permissible or constituting an abuse of process~~,

107. Insofar as an act complained of by the Cs occurred more than 3 months before the date of the presentation of the claim does the ET have jurisdiction to determine that act,

108. If any act complained of is out of time, should time be extended on a just and equitable basis including because it forms part of a continuing act.