Case Numbers: 3334546/2018; 3310912/2019; 3321318/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr A Gumma	**v**	(1) North West Anglia NHS Foundation Trust; (2) Ramsay Healthcare UK

Heard at: Norwich (part in person 2020)
(part CVP 2021)

On:

Reading Days:	9, 10 and 11 November 2020
Hearing Days:	12, 13, 16, 17, 18, 23, 25, 26, 27 November 2020
Refreshing Reading Days:	20 and 21 January 2021
Hearing Days:	22, 25, 26 and 27 January 2021
Members Discussion Days:	28, 29 January 2021 1, 2 and 3 February 2021

Before: Employment Judge Postle

Members: Mrs M Prettyman and Mr A Chinn-Shaw

Appearances

For the Claimant:	Mr S Cheetham, QC
For the First Respondent:	Miss Motragi, Counsel
For the Second Respondent:	Miss Patterson, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The Claimant's claims against the First and Second Respondents under the Equality Act 2010 (as set out) are not well founded, are out of time and the Tribunal does not exercise its discretion to extend time.

2. The Claimant's claims against the First and Second Respondents that she was unfairly dismissed, suffered detriments for making protected

disclosures, or automatically unfairly dismissed, are not well founded and in part out of time (as set out).

REASONS

1. The Claimant brings claims to the Tribunal under the Employment Rights Act 1996 for ordinary unfair dismissal; claims also under the Employment Rights Act 1996 for automatic unfair dismissal, Section 103A; detriments for having made protected disclosures contrary to Section 47B, also of the Employment Rights Act 1996. There are, in addition, claims under the Equality Act 2010 for the protective characteristic of sex, particularly direct sex discrimination pursuant to Section 13; and victimisation under Section 27 of the Equality Act 2010.

2. The Tribunal will also have to consider jurisdictional issues in relation to the claims. Particularly time issues given the dates of Acas Early Conciliation and the dates each claim was filed. In the case of claims under the Employment Rights Act 1996, whether is was reasonably practicable to have issued within the 3 month period, plus any additional time for Early Conciliation; and under the Equality Act 2010 whether it would be just and equitable to extend time.

3. The detail of the issues has been set out in a document agreed between the parties' Counsel.

<u>AGREED LISTS OF ISSUES</u> – First Respondent

In the case of the First Respondent's issues, these are as follows:

(2) PRELIMINARY ISSUES – JURISDICTION

2.1 Does the Employment Tribunal have jurisdiction to hear each of the claims set out in paragraphs 4.7, 5.1 and 6.3 below having to: [the first claim against the First Respondent 3310912/2019]

- 2.1.1 the date that the ET1 Claim Form was presented, namely 2 March 2019;
- 2.1.2 the date Acas received the Early Conciliation Notification, namely 2 January 2019; and
- 2.1.3 the date the Early Conciliation period ended, namely 2 February 2019?
- 2.1.4 whether any acts or omissions before 3 October 2018 are part of a continuing act or course of conduct?
- 2.1.5 if any claims are out of time, is it just and equitable to extend time?

2.2 In respect of the second claim against the First Respondent [3321318/2019], the Claimant's notification to Acas was 29 June 2019.

The Early Conciliation ended on 16 July 2019. The claim was presented to the Employment Tribunal on 16 August 2019. Given the claim was presented within a month of the end of conciliation, any acts or omissions prior to 30 March 2019 are out of time unless part of a series of continuing acts.

(3) ORDINARY UNFAIR DISMISSAL

3.1 Was the Claimant dismissed for a potentially fair reason within the meaning of Section 98(2) of the Employment Rights Act 1996 ("ERA")? The Respondent relies upon the potentially fair reason of conduct.

3.2 If the Claimant was dismissed for a reason relating to the Claimant's conduct, in the circumstances did the Respondent act reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the Claimant in accordance with Section 98(4) of the ERA? In particular:

- 3.2.1 Did the Respondent believe the Claimant to be guilty of misconduct?
- 3.2.2 Did the Respondent have reasonable grounds for believing that the Claimant was guilty of that misconduct? and
- 3.2.3 At the time the Respondent held that belief, had it carried out as much investigation as was reasonable in all of the circumstances of the case?

3.3 In all the circumstances was the decision within the range of reasonable responses of a reasonable employer?

3.4 If there were any defects in the procedure leading to the Claimant's dismissal, which is denied by the Respondent, were any defects remedied by the appeal procedure that was subsequently followed?

3.5 If the Claimant was unfairly dismissed by reason of procedural grounds, which is denied by the Respondent, would the Claimant still have been dismissed on the grounds of conduct had a fair procedure been followed?

3.6 The Claimant alleges that the dismissal was unfair by reason that the Respondent did not sufficiently take into account:

- 3.6.1 the Claimant's repeated complaint that she had been harassed and discriminated against in an attempt to drive her out of private practice;
- 3.6.2 the Respondent's alleged failure to rectify or investigate the allegedly unfair SI investigation which had targeted the Claimant and subjected her to unfair criticism;
- 3.6.3 the Respondent's alleged failure to investigate the alleged accessing and misuse of information by colleagues of the Claimant;

3.6.4 the Respondent's alleged failure to investigate or discipline others who had allegedly gathered clinical information about patients of other colleagues;

3.6.5 the Respondent's alleged failure to investigate or discipline Mr Abuzoda when, during the audit, it was allegedly discovered that he had also accessed patient information;

3.6.6 the Respondent's alleged failure to investigate the fact that patients on the list provided by the Claimant to Dr Rege in November 2017 had not been declared SIs, in contrast to the three cases involving the Claimant;

3.6.7 the Respondent's alleged failure to properly investigate the Claimant's complaint outlined in her letter of 19 March 2018 (abuse of clinical governance);

3.6.8 the Respondent's alleged failure to investigate the alleged practice in the department of retaining clinical information about patients of others / complications suffered by patients of others;

3.6.9 the alleged repeated and relentless targeting of the Claimant by her colleagues;

3.6.10 the alleged lack of support from management extended to the Claimant in relation to the alleged sustained targeting;

3.6.11 the fact that the information the Claimant had gathered was alleged to be for the purpose of highlighting discrimination and unsafe clinical practice and that the information was shared only with the Medical Director and the Royal College investigators;

3.6.12 the fact that at the time the Claimant had accessed the patient electronic records, she had allegedly been suffering relentless and unabated targeting from colleagues regarding her own clinical practice; and

3.6.13 the fact that at material times the Claimant was allegedly suffering from stress and / or was ill?

(4) WHISTLEBLOWING CLAIMS

Protected Disclosures

4.1 Did the Claimant make a disclosure of information? The Claimant relies upon the alleged disclosures listed in Schedule 4 of the Scott Schedule (which matters are referred to in paragraphs 5(i), 6(b - n), 8(a – f), 15, 21, 22, 24, 27, 28, 29, 36 and 39 of the Particulars of Claim in case number: 3310912/2019 and also at paragraphs 19, 21, 24, 26-27, 34 and 39 of the Particulars of Claim in case number: 3321381/2019).

4.2 Were the disclosures made in accordance with Sections 43C to 43H of the ERA? The Claimant relies upon the sections of 43C-H set out in Schedule 4 of the Scott Schedule.

4.3 Did the Claimant reasonably believe that the disclosures tended to show one or more of the matters set out in Section 43B(1)(a)-(f) of the

Employment Rights Act 1996? The Claimant relies upon the sections of 43B(1)(a)-(f) set out in Schedule 4 of the Scott Schedule.

4.4 Were the disclosures made in the public interest?

4.5 The Respondent has set out, in the final column of Schedule 4 of the Scott Schedule, whether or not it accepts that each alleged protected disclosure, was a protected disclosure.

Automatic Unfair Dismissal

4.6 Was the reason, or principal reason, for the Claimant's dismissal, that she had made protected disclosures as outlined in paragraphs 4.1 to 4.4 above? The protected disclosures relied upon by the Claimant for the purposes of this claim are all of those listed in Schedule 4 of the Scott Schedule (which matters are referred to in paragraphs 5(i), 6(b – n), 8(a – f), 15, 21, 22, 24, 27, 28, 29, 36 and 39 of the Particulars of Claim in case number: 3310912/2019.

Alleged Detriments

4.7 Did the Respondent subject the Claimant to detriments on the ground that she had made protected disclosures as outlined in paragraphs 4.1 to 4.4 above? The Claimant relies upon the alleged detriments listed in Schedule 5 of the Scott Schedule (which matters are referred to in paragraphs 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 26, 27, 29, 31, 33, 35, 38, 40 and 41 of the Particulars of Claim in case number: 3310912/2019 and in paragraphs 52 – 54 of the Particulars of Claim in case number: 3321381/2019).

(5) DIRECT SEX DISCRIMINATION

5.1 The Claimant alleges that she was subjected to less favourable treatment as set out in Schedule 1 of the Scott Schedule (which matters are referred to in paragraphs 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 26, 27, 29, 31, 33, 35, 38, 40 and 41 of the Particulars of Claim in case number: 3310912/2019 and in paragraphs 52 – 54 of the Particulars of Claim in case number: 3321381/2019), together with the Claimant's dismissal.

5.2 Was the Claimant subject to less favourable treatment as set out in paragraph 5.1 above?

5.3 If so, was the less favourable treatment because of her sex? The Claimant relies upon a hypothetical comparator (i.e. a man whose circumstances are not materially different to the Claimant's circumstances), and named comparators as follows: Stephen Havenga, Harnek Rai, Bruce Ramsay, Amir Sriemevan, Usma Abuzoda and Paul Simpson.

5.4 Schedule 1 of the Scott Schedule sets out in respect of which alleged act or acts each named comparator is relied upon. A hypothetical comparator is also relied upon in respect of all alleged acts of discrimination. Only a hypothetical comparator is relied upon in respect of paragraphs 52 – 54 of the Particulars of Claim in case number: 3321381/2019.

(6) VICTIMISATION

Protected Act

6.1 Did the Claimant do protected acts? The Claimant relies upon the alleged protected acts listed in Schedule 2 of the Scott Schedule (which matters are referred to in paragraphs 5(i), 6(b – i)(l – n), 8(a – f), 21, 22, 27, 28, 29, 36 and 39 of the Particulars of Claim in case number: 3310912/2019 and in paragraphs 19, 24, 26 – 27, 34 and 39 of the Particulars of Claim in case number: 3321381/2019). The Claimant relies upon the subsections(s) of Section 27(2)(a)-(d) of the Equality Act 2010 ("EqA") set out in Schedule 2 of the Scott Schedule.

6.2 The Respondent has set out, in the final column of Schedule 2 of the Scott Schedule, whether or not it accepts that each alleged protected act, was a protected act.

Alleged Detriments

6.3 Did the Respondent subject the Claimant to detriments because she had done protected acts as outlined in paragraph 6.1 above? The Claimant alleges the alleged detriments listed in Schedule 3 of the Scott Schedule (which matters are referred to in paragraphs 12, 13, 14, 16, 17, 18, 19, 20, 22, 23, 26, 27, 29, 31, 33, 35, 38, 40 and 41 of the Particulars of Claim in case number: 3310912/2019 and in paragraphs 52 – 54 of the Particulars of Claim in case number: 3321381/2019), together with the Claimant's dismissal.

(7) REMEDY

7.1 If successful, the Claimant seeks compensation only.

7.2 If successful, what compensation should the Employment Tribunal award to the Claimant, to include consideration of entitlement to an award for injury to feelings in respect of any unlawful detriment or discrimination as is found to have occurred?

7.3 Should any compensation as is awarded to the Claimant be reduced to reflect:

7.3.1 sums earned by way of mitigation, or to reflect any failure to take reasonable steps to mitigate her loss on the Claimant's part;

7.3.2 Polkey principles;
7.3.3 any unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures;
7.3.4 Sections 122 and 123 of the ERA (contributory fault);
7.3.5 that the Employment Tribunal considers it would be just and equitable to do so (either because any relevant disclosure made by the Claimant was not made in good faith, or otherwise); and
7.3.6 the application of the statutory cap (if applicable)?

AGREED LIST OF ISSUES – Second Respondent

In relation to the issues against the Second Respondent,

(2) DIRECT SEX DISCRIMINATION

2.1 Did the Respondent treat the Claimant less favourably as alleged by:

a. Restricting the Claimant's practising privileges on 5 September 2017;
b. Maintaining the restrictions against the Claimant's privileges after the Claimant had provided information responding to the allegations in September 2017 and / or following the feedback from the RCOG panel in December 2017;
c. Linking the continuation of the Claimant's restricted practising privileges to her sharing of information linked to patient safety in December 2017; and
d. Terminating the Claimant's practising privileges on 18 June 2018.

2.2 If so, does the alleged less favourable treatment amount to less favourable treatment because of the protected characteristic of sex?

2.3 Who is the appropriate comparator?

a. The Respondent invites the Tribunal to accept that the appropriate comparator is a male Consultant Gynaecologist of similar standing to the Claimant and who had (1) experienced similar patient surgical complications; (2) had breached data protection and confidentiality by releasing sensitive and confidential patient details to an external review investigator; and (3) failed to provide information regarding their practice in order to consider safety concerns.

b. The Claimant invites the Tribunal to accept that the appropriate comparator is a male Consultant Gynaecologist who also practises in Peterborough City Hospital and who had one unconfirmed allegation of patient complication; for 2.1(c) and (d), the appropriate comparator is a hypothetical male Consultant Gynaecologist, also practising in Peterborough City Hospital, and who had one

unconfirmed allegation of patient complication and who had shared information linked to patient safety in December 2017.

2.4 The Claimant confirms that, in addition to the hypothetical comparator referred to above, she in addition relies upon her male colleagues at Ramsay whose practicing privileges were not suspended and / or terminated, as set out in her Grounds of Claim at §§ 3, 9, 16 and 29 as actual comparators.

2.5 For the avoidance of doubt those male comparators are: Mr Harnek Rai, Mr Sriemevan, Mr Stephen Havenga and Mr Bako. The Claimant relies in particular in Mr Sriemevan who also had bladder incidents.

(3) VICTIMISATION

3.1 Did the Claimant's verbal complaint during her meeting with Mr Cottam and Ms Groom on 8 September 2017 and / or the Claimant's email to Mr Cottam on 25 September 2017 amount to protected acts within the meaning of Section 27(2) EqA?

3.2 If so, did the Respondent subject the Claimant to a detriment by:

a. Maintaining the restriction against her practising privileges after the Claimant had provided information responding to the allegations in September 2017 and / or following the feedback from the RCOG panel in December 2017;
b. Linking the continuation of the Claimant's restricted practising privileges to her sharing of information linked to patient safety in December 2017; and
c. Terminating of the Claimant's practising privileges on 18 June 2018.

3.3 If so, did the Respondent subject the Claimant to these detriments because of the Claimant's verbal complaint on 8 September 2017 and / or her email to Mr Cottam on 25 September 2017.

(4) DETRIMENT ON THE GROUND OF HAVING MADE A PROTECTED DISCLOSURE

4.1 The Respondent admits that the following is a protected disclosure pursuant to Section 43A of the Employment Rights Act 1996 ("ERA"):

a. Claimant's email on 25 September 2017 (timed at 1921 hours) to Carl Cottam.

4.2 Did the following also amount to a protected disclosure pursuant to Section 43A ERA?

a. Claimant's verbal discussion with the RCOG Assessor on 7 December 2017; and
b. the provision by the Claimant to the RCOG of a list of 80 serious patient complications?

4.3 Did the Respondent subject the Claimant to the following alleged detriments because of the matters listed at 4.1 and / or 4.2?

a. Continuing the restrictions against her practising privileges after the Claimant had provided information responding to the allegations in September 2017 and / or following the feedback from the RCOG panel in December 2017;
b. Linking the continuation of the Claimant's restricted practising privileges to her sharing of information linked to patient safety in December 2017; and
c. Terminating the Claimant's practising privileges on 18 June 2018.

(5) EMPLOYMENT STATUS OF / LIABILITY FOR the actions of Mr Sriemevan, Mr Havenga and Mr Rai (to be determined at remedy stage, if any and if still relevant)

5.1 The Claimant relies not only on the motive / actions of the decision maker(s) but also on the motive / actions of those exerting influence on the decision maker(s), namely Mr Sriemevan, Mr Havenga and Mr Rai, as set out in the amendment to §§ 29 and 41 of the Claimant's Particulars of Claim.

5.2 Were Mr Sriemevan, Mr Havenga and Mr Rai in employment for the purposes of Section 83 of the Equality Act 2010 ("EqA")?

a. If yes, were the alleged discriminatory actions by Mr Sriemevan, Mr Havenga and / or Mr Rai done "in the course of employment"?
b. If yes, did the Respondent take all reasonable steps from doing "that thing" or from doing anything of "that description"? and
c. If yes, is the Respondent liable for the actions by virtue of Section 109(1) EqA?

5.3 Were Mr Sriemevan, Mr Havenga and Mr Rai employees and / or workers for the purposes of Section 230 ERA 1996 and / or Section 43K ERA?

a. If yes, did the Respondent take all reasonable steps from doing "that thing" or from doing anything of "that description"? and
b. If yes, is the Respondent liable for their actions by virtue of Section 47B(1A) ERA?

(6) TIME LIMITS

6.1 Taking into account the appropriate limitation periods for the claims pleaded, are the following acts out of time:

a. Restricting the Claimant's practising privileges on 5 September 2017;
b. Maintaining the restrictions against the Claimant's privileges after the Claimant had provided information responding of the allegations in September 2017 and / or following the feedback from the RCOG panel in December 2017;
c. Linking the continuation of the Claimant's restricted practising privileges to her sharing of information linked to patient safety in December 2017.

6.2 Do the acts complained of amount to an ongoing course of conduct and / or a continuing act?

6.3 In the alternative, in respect of the Claimant's claims under the Equality Act 2010, is it just and equitable to extend the time limit to consider all of the Claimant's claims?

6.4 In the alternative, in respect of the Claimant's protected disclosure detriment claim, was it reasonably practicable for the Claimant to present a claim in time?

7. In this Tribunal we have heard evidence from the following:

7.1 The Claimant, through a prepared witness statement consisting of 313 paragraphs. The Claimant called no further evidence.

7.2 For the First Respondent, the Tribunal heard evidence from:

- Dr K Rege, the Claimant's Line Manager and Medical Director;
- Mr A Sriemevan, Consultant in Gynaecology and Obstetrics;
- Dr D Woolf, Consultant Paediatrician;
- Mr S Havenga, Associate Clinical Director;
- Dr P Samrai, Legal Services Manager;
- Ms D Lynch, General Manager;
- Dr C Denman, Medical Director and external disciplinary member;
- Mr Rai, Consultant Gynaecologist and Obstetrician, originally the Claimant's Line Manager; and
- Mr G Wilde, Chief Operating Officer.

All those witnesses giving their evidence through prepared witness statements.

7.3 For the Second Respondents, the Tribunal heard evidence from:

- Mr C Ranaboldo, Group Medical Director;
- Mr C Cottam, General Manager; and
- Ms J Groom, Matron.

All those witnesses giving their evidence through a prepared witness statement.

7.4 The Tribunal also had the benefit of an agreed amended chronology. Five lever arch Bundles on behalf of the First Respondents consisting of 2,050 pages. Three lever arch Bundles on behalf of the Second Respondents consisting of 1,042 pages. A further Bundle of miscellaneous documents in relation to the General Medical Council consisting of 161 pages.

7.5 Finally, the Tribunal had the benefit of detailed written submissions on behalf of the Claimant consisting of 36 pages. On behalf of the First Respondent written submissions consisting of 82 pages. Finally, on behalf of the Second Respondent written submissions consisting of 32 pages. Each Counsel was afforded the opportunity of amplifying those written submissions orally before the Tribunal.

7.6 As these submissions are in writing, no disrespect is intended to any Counsel, but it is not necessary to rehearse those as they are there for all to see.

THE FACTS

8. The First Respondent is an NHS Foundation Trust formed on 1 April 2017 by the acquisition of Hinchingbrooke Healthcare NHS Trust by Peterborough and Stamford Hospitals NHS Foundation Trust. The Respondent is responsible for delivering healthcare to approximately 700,000 residents living in Cambridgeshire, South Lincolnshire and neighbouring Counties.

9. The First Respondent runs In-patient and Out-patient services from several Hospitals, namely: Peterborough City Hospital; The Prince of Wales Hospital; Ely Hospital; Doddington Hospital; North Cambridgeshire, Hinchingbrooke Hospital; and Stamford and Rutland Hospital.

10. The Claimant commenced her employment with Peterborough and Stamford Hospitals NHS Foundation Trust on 1 June 2009 as a Consultant in Obstetrics and Gynaecology. The Claimant performed private work at the Fitzwilliam Hospital and the Boston West Hospital, which are run by the private healthcare provider Ramsay Healthcare UK, the Second Respondent in these proceedings. As a Consultant, the Claimant is required to comply with her professional obligations as a Doctor which include the National Guidance set out in the General Medical Council's

Good Medical Practice. The Claimant is also required to maintain patient confidentiality in accordance with the terms of Good Medical Practice, the GMC's Confidential Guidance and the Respondent's own internal policies. Although the Claimant was recruited primarily to undertake an obstetrician's role, she nevertheless started to do gynaecology work in a gynaecology private practice. The Fitzwilliam Hospital offers gynaecology services, but no obstetrics.

11. Mr Rai, a Consultant Gynaecologist and Obstetrician, was the Associate Clinical Director for Gynaecology and for a period, particularly January 2014 it is believed until January 2015, at which point Dr Rege took over, as the Claimant's Line Manager. In 2011, Mr Rai became aware of a case the Claimant had undertaken using vaginal mesh at the Fitzwilliam Hospital, having been informed by the Theatre staff. It is apparently quite common for Theatre staff to raise issues where matters of concern arise in the Theatre. As they would not wish to question the Consultant involved, as a result of these issues being raised, Mr Rai in turn spoke to Mr Havenga a Consultant Obstetrician and Gynaecologist at the Trust, he was also at the relevant time the Gynaecology spokesman at the Fitzwilliam Hospital's Medical Advisory Committee. Mr Rai sent him a letter on 7 September 2011 in which he sets out his concerns about the vaginal mesh that had been inserted by the Claimant during an operation, (pages 414 – 415).

12. It would be the normal situation at the First Respondent's that any mesh repairs would be undertaken only by a specialist Urogynaecology Team. A team which Mr Rai led. Mesh repairs apparently have been known to cause devastating side effects for patients, including mesh infection and mesh erosion, pain, bleeding, bowel and urinary problems and difficulties with sexual intercourse. Apparently, the use of mesh had attracted national publicity in recent years, as well as litigation from a number of patients who had been affected by such an operation. At the time the Claimant was involved in this operation and the use of mesh, it was regarded as controversial and should have only been undertaken, apparently, by specialists following careful counselling of the patient so that they were fully informed as to the risks involved before the procedure was undertaken.

13. Mr Rai's concerns were two fold. Firstly, that the Claimant had apparently undertaken the procedure, one that she did not perform at the Trust Hospital. It is apparently accepted practice that Consultants only perform procedures in the private sector that they perform regularly in their Consultant NHS Practice. This is to ensure that a sufficient number of procedures are being undertaken to ensure the skill levels are kept at an appropriate high level. Apparently, the Claimant had never performed such mesh surgery at the Trust and is not a Urogynaecologist. Secondly, Mr Rai was concerned that the patient had not been informed of the use of mesh prior to the surgery by the Claimant and therefore had not consented to its use. Mr Rai, although raising these concerns, was not informed of any outcome following those concerns.

14. It was approximately a year later, some time around November 2012, that the same patient referred to above had been referred to Mr Rai at the Trust. The reasons for the referral was the patient had presented with urinary issues and vaginal bleeding. Mr Rai found the patient had a large mesh erosion in her vagina which required surgery to remove the eroded mesh and there was a risk that the patient would suffer bowel injury as a result. The result of such a bowel injury could have been very serious, including bleeding, faeces being excreted through the vagina and that the patient would have needed to have a stoma; a colostomy. As a result of this and the fact that Mr Rai had not been informed of the outcome of his original concerns, he raised this again by letter to the Fitzwilliam Hospital, this time to the Matron and copied to the Chairperson of the Medical Advisory Committee, Fitzwilliam Hospital's Governance Lead, (pages 429).

15. Mr Rai operated on the patient on 1 November 2012. Fortunately, he was able to remove the eroded mesh without any bowel injury. However, upon speaking to the patient, Mr Rai became aware that the patient had not been informed, or consented to the insertion of mesh, the patient was not surprisingly annoyed. Mr Rai therefore reported this to the Trust's Medical Director, at the time Mr J Randall and Mr S Havenga the same day, forwarding them a copy of Mr Rai's letter to the Fitzwilliam Hospital.

16. Mr Randall was Mr Rai's Responsible Officer and was also the Responsible Officer for the Claimant. Mr Rai felt it was important to escalate this through the appropriate channels within the Trust, through the Responsible Officer to ensure that it was appropriately addressed with the Claimant and resolved at a local level.

17. Mr Randall replied to Mr Rai on 6 November 2012, (pages 430 – 431), requesting further details which Mr Rai duly provided, (pages 646 – 647). Mr Rai also discussed the case on a strictly anonymous basis with a Lead Consultant Urogynaecologist and Pelvic Reconstructive Surgeon at the Addenbrooke's Hospital and his views were forwarded also to Mr John Randall, (pages 468 – 470).

18. On 11 December 2012, Mr Rai had cause to report further concerns to Mr Randall regarding two further incidents which had occurred at the Fitzwilliam Hospital involving the Claimant. One involved a young woman who had been admitted for the removal of a cyst on her ovary, but ended up with the removal of the whole ovary as the Claimant had injured the main blood vessel to the ovary and there had been excessive blood loss. The other involved a procedure which had to be abandoned as the Claimant was unable to perform it, (page 458).

19. It is clear, the reason why Mr Rai raised his concerns at the time, was concern about patient safety because it seemed to him that the Claimant had undertaken risky procedures outside her usual area of practice without the relevant training and expertise and without counselling the patient

beforehand. It is clear that had concerns arisen with a male Consultant, Mr Rai would have raised them regardless of the Consultant's gender.

20. It is clear that Mr Rai has on other occasions raised issues of concern where he felt that a patient had not received treatment in accordance with best practice; he is a man prepared to speak about the safety of patients and where necessary to have difficult conversations about such matters. This is regardless of the Consultant or Doctor's sex or gender.

21. The issue of the mesh had been previously addressed by the Matron at the Fitzwilliam Hospital by letter of 18 October 2011, (page 418), in which the Claimant was instructed in future to ensure her practice reflected directly the practice that she frequently undertook at Peterborough City Hospital. Further, that if she encountered problems or complications whilst operating, she must inform a senior colleague and ensure that she gets advice and assistance.

22. In the intervening period, Mr Havenga, Associate Clinical Director, met with the Claimant towards the end of 2012 to discuss with the Claimant some concerns and issues that had been raised by senior colleagues and Mr Ramsay at an informal meeting. The purpose of the meeting between Mr Havenga and the Claimant was intended clearly as a supportive measure. The Claimant requests Mr Havenga puts matters discussed at that meeting in writing, which he does by letter of 12 December 2012. (pages 648 – 653). In that letter, he clearly sets out a range of issues and concerns about the Claimant's practice and asks her to reflect, not only about her practice, but particularly about her work life balance and commitment to her primary role, the Trust. What is clear, is that Mr Havenga did not tell the Claimant other colleagues were keeping a list about the Claimant and her operations / complications. Rather, he was discussing concerns being raised in a letter from a colleague.

23. Around 2 October 2012, Mr Sriemevan was informed by a member of staff that a female patient had been referred to the Claimant for a second opinion about a hysterectomy which the Claimant had agreed to perform. In an email to the Claimant of 2 October 2012, (page 428), Mr Sriemevan confirms that this patient had been under his care and that in his opinion it was a risky operation for the patient, particularly to be done by a general gynaecologist and expressing his concern about the safety of the patient. At the same time he confirmed that a copy of this had been sent to Mr Havenga, a speciality lead and Mr B Ramsay as Clinical Governance to investigate. Mr Ramsay had said in an email of 15 June 2012, (page 426), that the Claimant had offered surgery to a woman whereas other gynaecologists have already given an opinion that this would not be in the best interests of the patient. At that stage, Mr Ramsay had noted there were concerns about the Claimant's whole practice and to see if there was a consensus view that she is repeatedly showing poor judgment and probity.

24. As to the lack of Registrars during Clinics, this had been made aware to the Claimant and other candidates when they joined the Respondents, that given that there was a national shortage of Registrars, that it would not always be possible to provide Consultants with a dedicated Registrar at the Clinic whether male or female Consultant on duty.

25. In the meantime, the Claimant appears to have written to the BMA on 11 November 2012, complaining about various matters relating to her colleagues, (page 441). There appears no response from the BMA to this letter, certainly not seen by the Tribunal. The Claimant does raise on 19 November 2012, her concerns in a letter to Linda Compton following an informal discussions with her in November. This is set against the background of a number of concerns being voiced by the Claimant's colleagues about her patient care. It does appear that Mrs Compton, around this time, does not reply to the letter, if indeed the letter was sent to Mrs Compton as there appears no acknowledgement. The Claimant at the time does not appear to push the matter any further with Mrs Compton for a response.

26. Mr Woolf does not record any meeting with the Claimant on 13 December 2012, and having checked his diary, there is no entry for such a meeting. He accepts sometimes the Claimant did drop in to see him unannounced, but he simply cannot recall any meeting on that date which the Claimant describes. The Claimant says the meeting was with Diane Lynch also in attendance, who was the General Manager of Family and Public Health Clinical Directorates. Equally, she has no note going back to 2012 of such a meeting, but has retained her calendar and again there is no note recorded on her calendar of such a meeting taking place. On the day in question, Ms Lynch's calendar records she has meetings all day, but not with the Claimant. Ms Lynch accepts had the Claimant come for a meeting to raise such matters, she would have kept a careful note. Ms Lynch also does not recall any incident where the Claimant was crying so much she could not talk. She says had such complaints been made of sexism, then she would have encouraged the Claimant to make a formal complaint under the Trust's Dignity at Work Policy.

27. On 14 February 2013, the Claimant emails Mr Randall, (page 485), to confirm she is now happy for him to inform Mr Cottam at the Fitzwilliam Hospital regarding the mesh incident that it is now closed. However, she did not want an exact copy of Mr Randall's letter being sent following her meeting with him regarding an oncology issue which had been raised by the Addenbrooke Hospital over the Claimant's care or a patient.

28. Then in a further meeting on 28 February 2013, between the Claimant and Mr Ramsay the Gynaecology and Oncology Lead, to discuss yet further concerns raised through routine governance processes about her management of oncology cases. In an email also of 28 February 2013 between Mr Ramsay and Mr Randall and copied to the Claimant it was confirmed that most of her cases were appropriately managed and that most of the problem cases identified had been in a cluster in the last year.

The email also confirmed the Claimant's positive frame of mind moving forward and that the meeting had proved worthwhile and constructive.

29. Mr Randall then writes to the Claimant on 15 March 2013 referring to the above meeting and review, requesting a meeting to discuss outcomes with Mr Ramsay. That meeting was not part of any maintaining high professional standards procedure, it was a formal discussion around the letter of concern and findings at the above meeting. The Claimant did not respond to the request for a meeting and for reasons unknown to the Tribunal, no meeting ever took place until 7 June 2013. The outcome is summarised in Mr Randall's letter of 10 June 2013, (page 497), in which he identified and agreed with the Claimant, several learning points and these were:

- Reviewing and acting on results promptly;
- Supervising Registrar management plans; and
- Referring onto the recognised gynaecology team at an early stage when needed.

30. At that meeting, the Claimant had questioned the accuracy of some of the statements. As a result Mr Randall had read out the concerns directly from the review of cases in relation to the issues identified. The Claimant had also stated she felt targeted and again expressed concern as to the validity of the conclusions. As a result of which the Claimant was offered the opportunity of all the cases being reviewed externally within the capability process if she wished. The Claimant declined this offer. The matter was confirmed as closed.

31. On 18 January 2013, (page 481), Mr Randall wrote to the Claimant following a further meeting about the mesh incident which had re-emerged as a result of this patient requiring further corrective surgery. In turn this had followed the matter being raised by Mr Rai who, following problems with the mesh, undertook corrective surgery. This matter was now considered closed by the Medical Director Mr Randall. However, concern had also been raised by a Consultant at the Addenbrooke's Hospital by letter of 17 January 2013 about patient care by the Claimant in which it was said she had not followed local and national mandated clinical oncology pathways. Mr Randall had reiterated to the Claimant the need to ensure clinical practice, she was performing for third parties such as the Fitzwilliam Hospital, should only be that which she performs in the NHS. The Claimant seems to have taken on board the advice as the letter confirmed. (page 481a). The Claimant had reflected and would no longer be performing surgery at the Fitzwilliam Hospital which was not part of her routine NHS practice.

32. On 10 March 2013, Mr Rai sent an email, copied to all Consultants in the Claimant's department whether male or female, (pages 1923 – 1925), expressing his concern about a General Gynaecology Clinic which was to be a female Consultant only Clinic and whether everyone felt comfortable that such a Clinic was being promoted by the Trust given recent traumatic

incidents in the delivery suite and was in fact canvassing views about the proposal..

33. On 11 March 2013, the Claimant responded suggesting the Trust should be able to offer patient choice within reason, but noting patients cannot demand an all female Clinic being available on all occasions and citing the recent events in the delivery suite as an extreme example.

34. On 11 March 2013, another Consultant Mr Chris Siozus, copied to all suggesting having all female Clinics in all areas does not make a lot of sense.

35. On 11 March 2013, Mr Sriemevan, again copied to all Consultants whether male or female, responds citing in his opinion female only is an insult to *"all of us"*, not suggesting it was an insult just to male consultants.

36. On 3 July 2013, the Claimant appears to have been interviewed by an investigator who was investigating some complaints made by other colleagues (the Tribunal have not seen those complaints), the investigator being Ms Tiplady a Senior Manager with the First Respondent. At that meeting, the Claimant did raise concerns about the working environment. In particular sexist remarks from Mr Rai. However, that investigation was in respect of other colleagues and nothing seems to have come of the Claimant's allegations, but equally the Claimant does not seem to have pushed these allegations at the time or raised any form of Dignity at Work grievance in accordance with the Trust's policies.

37. On 8 February 2015, there occurred on the maternity unit a serious incident, in which a trainee Obstetrician Doctor Specialist Registrar had made several attempts to deliver a baby. The patient had to be transferred to the operating theatre for an emergency caesarean. The baby was in poor condition and required resuscitation. The Claimant was the Consultant in charge and despite being bleeped on a number of occasions, did not provide the assistance to the Doctor as would be required of a Consultant on duty, until in fact the baby had been delivered. As a result of this, Mr Havenga and Mr Rai, the Claimant's Line Manager, arranged a meeting to discuss the incident which would not be unusual following such an incident. The meeting took place on 26 February 2015. It would appear the Claimant should have supported the Doctor, in the brief minutes of the meeting, (page 506), the Claimant had said she had been reviewing patients in triage when she first received the call and then in the delivery suite on subsequent calls to her.

38. Following the meeting, Mr Rai emailed Mr Randall and Mr Havenga and Mr Woolf and others on 28 February 2015 (page 725), expressing concern that the Claimant may not have been triaging, or have been in the delivery suite, when she received calls for assistance as there appeared no documented evidence of patients being reviewed or being seen by the Claimant on the day in question. Furthermore, it appears all calls the Claimant had in fact made were from her office. Mr Rai goes on to

suggest that this was a clear breach of Probity rule 9 and good medical practice, requesting that the matter be dealt with along formal lines. There then followed an investigation of the above incident, the Claimant was informed by letter of 27 March 2015 (page 735) there was to be an investigation. Her response to this appears to have been to raise a Dignity at Work grievance on 7 April 2015, suggesting that the meeting conducted on 26 February 2015 was conducted, amongst other things, in an aggressive and intimidating manner in which particularly Mr Rai sat so close to the Claimant that his knee was touching her knee (page 607).

39. In the intervening period, the Claimant alleges she raised issues of bullying and victimisation with Linda Compton and Diane Lynch on 2 April 2015 (the Claimant's notes pages 510 – 511). However, again Ms Lynch having checked her calendar notes, says on that date she was on leave so there could not have been a meeting as suggested. She does accept there was a meeting from her calendar entry with the Claimant on 7 April 2015 and confirms the content of the meeting in an email of 14 April 2015 (page 520) to Mr Randall and Mr Woolf. At the meeting the Claimant had raised concerns about her relationship with colleagues and difficulties in the department generally. Again set against a background of concerns being voiced by the Claimant's colleagues about her patient care. The email tone was in the form of a general update.

40. There does occur on 2 April 2015 (pages 515 – 516), a letter from the Claimant's, Doctors and Dentists' Protection Union expressing concern about the incident of 8 February 2015, but more particularly a question of the Claimant's whereabouts and the Claimant's probity, in which the Claimant believed she was the subject of harassment from Senior Consultant colleagues in her department. The letter requested the reasons that led the Trust to commencing a formal disciplinary investigation into the incident on 8 February 2015.

41. The investigation of the events of 8 February 2015 was conducted by Ms Tiplady. The Claimant was interviewed, as was Mr Rai, Mr Havenga and Doctor Mavridou (the Doctor on duty) and also the Midwife on duty on the day in question. The outcome of the report is at pages 774 – 789 dated 18 August 2015. The conclusions at page 785,

> *"There is little detail in respect of timings, however,* [the Claimant's] *accounts for her whereabouts and actions are broadly corroborated by other staff. The exception is that she did not state that she went to her office and that the phone calls responding to the bleeps were made from there.*
>
> *There is no evidence of the documentation in patient notes that AG claims to have made.*
>
> *There is a discrepancy about documentation and whether or not she* [the Claimant] *suggested that she assist the Doctor on duty with her statement.*

There are discrepancies between the Doctor on duty and Dr Gumma in respect of the order of events after the serious incident.

There are discrepancies in accounts about the order of events on the day of the serious incident between the Doctor on duty and Dr Gumma.

These discrepancies and the missing information do not amount to a lack of probity having regard to GMC good medical practice".

Joan Tiplady.

42. Surprisingly, given the Claimant's original factual account to Mr Rai and Mr Havenga, that the Report in the circumstances gives the Claimant the benefit of doubt in the Report's conclusions.

43. At the same time, the Dignity at Work investigation against Mr Rai was carried out by Ms Tiplady and again her Report is dated 18 August 2015 (pages 596 – 672) and the outcome was confirmed to the Claimant by Dr Rege the Claimant's Medical Director and Responsible Officer, and the outcome in a letter of 12 October 2015 (page 688) concluded no further action was required for the following reasons:

- The allegations were denied by Mr Harnek Rai and Mr Stephen Havenga and there was no other direct witness to the meeting;
- The physical set up of the room did not tend to support your account of the seating arrangements alleged;
- There was no evidence that anyone else present in the vicinity had overheard shouting in the meeting;
- There was no evidence that you have been put under inappropriate pressure to complete your factual account of events immediately after the meeting. These responses were in fact being co-ordinated by Deborah Mokate, not by Harnek Rai or Stephen Havenga; and
- Your complaints about the meeting on 26 February 2015 were not raised until some five weeks after the meeting itself.

44. It was further acknowledged there was a difficult working relationship between the Claimant and Mr Rai and Mr Havenga. The proposal was, taking the matter forward, work place mediation would be put in place, which the Claimant subsequently refused at a meeting on 10 December 2015 to participate in mediation. Notwithstanding, Mr Rai and Mr Havenga were willing to give mediation a chance, albeit with some conditions.

45. On 24 April 2015, the Claimant through Doctors and Dentists Protection Union by letter, (pages 734 – 744), raises yet again concerns on behalf of the Claimant regarding the Serious Incident investigation which relates to 8 February incident. The main thrust of the letter is,

> *"concerns over the circumstances in which the formal disciplinary process against the Claimant arose and Mr Randall's own role in the matter and the suggestion that Senior Clinicians would have influence over the SI investigation."*

46. The Investigator Ms Tiplady responds to the Claimant's representative's letter on 5 May 2015, (page 745), confirming that details relating to the Serious Incident will be included in the SI Report which is not as yet completed, the fact that the concerns were raised by Mr Rai and Mr Havenga and that the Claimant will have an opportunity to comment on the draft Report which will be circulated to all concerned.

47. Earlier in the year while the Claimant was on sick leave, sending an email to the department at 8:30am on the day she was due to undertake a Clinic, Mr Havenga emailed Mr Rai, Assistant Clinical Director, saying that the Claimant's email was not acceptable and in fact she should have phoned rather than emailed, as the email might not have been picked up in time.

48. In May 2015 whilst the Claimant was on sick leave, Mr Sriemevan took the decision in his capacity as College Tutor to scrap the Claimant's role as Deputy College Tutor following a Facilities meeting. When the Claimant questioned this in August by email, (page 588), Mr Sriemevan responded by confirming that as the Claimant was on restricted duties he did not want to over burden the Claimant with educational supervisor's duties as well. He also made the point that as she was on sick leave, trainees needed to be supervised during that period.

49. It has been further alleged by the Claimant that Mr Rai, on 14 July 2015, drove his car at the Claimant in the Hospital car park. Oddly, the Claimant being so concerned by such an alleged action, did not report the allegation / incident for a period of five weeks and although the Claimant says it was reported to the Police, Mr Rai has never been interviewed by the Police.

50. On 7 July 2015, the Claimant raised yet another grievance regarding the SI investigation, requesting the grievance be heard by Senior Members of the Board as the content of the grievance was complaining of acts that included those of the Members of the Senior Management, including Medical Director Mr Randall and Mr Crich, Director of Workforce and Organisational Development. The Respondent's position was the Claimant was being somewhat premature in raising these concerns and should wait until the outcome of the Report and if she still had concerns, raise them at that stage, (pages 769 – 771).

51. In July 2015, the Claimant was raising a complaint with Dr Woolf regarding problems she had experienced with the rota and alleged difficulties she said were placed in her way by Mr Sriemevan when she wishes to swap Clinics, (page 556). The Claimant alleges he was accusing her of taking time off to do private practice at the Fitzwilliam Hospital. However, there is no evidence in July 2015 that the Tribunal can find, or have been shown, that Mr Sriemevan was so accusing the Claimant of this. What appears to

have been the main problem, is the level of Registrar assistance assigned to Consultants at these Clinics.

52. On 10 November 2015, (pages 701 – 704), the Claimant raises yet a further formal grievance surrounding the events of the Serious Incident of 8 February 2015, focused against Mr Rai and Mr Havenga.

53. There then follows a meeting on 10 December 2015 between the Claimant, Mr Woolf, Ms Lynch and Ms Howes regarding the restoration of positive working arrangements between the Claimant and others in the department; particularly Mr Rai. It is at this meeting where mediation is once again raised, however, the Claimant confirmed that in her mind there are numerous outstanding incidents against Mr Rai and therefore mediation was not appropriate and was not willing to participate in. The Claimant confirmed any further discussions would be of limited value until her latest grievance was resolved.

54. On 8 January 2016, the Claimant emailed, (pages 807 – 808), Dr Woolf regarding a further allegation of harassment by Mr Rai suggesting that he had engaged in some form of internal investigation, *"that the Claimant failed to follow certain agreements",* suggesting he had some form of jealousy regarding the Claimant's private practice and repeats an allegation about trying to run the Claimant over in the car park and sexist comments made by Mr Rai. Mr Woolf's response was on 11 January 2016, to advise seeking advice from Ms Lynch, Dr Rege and HR as to how best to proceed. The reason being he was uncertain, given many of the issues raised by the Claimant had already been considered or were under active consideration.

55. On 8 March 2016, the Claimant chases Mr Woolf about the complaint. He responds on 8 March 2016, (page 805), apologising for any misunderstanding as he was under the impression that the grievance process which the Claimant was pursuing was the mechanism through which this was to be addressed. This then resulted in a meeting between the Claimant and Dr Rege her now Line Manager, on 22 March 2016. At this meeting Dr Rege suggests various causes of action in her letter of 22 March 2016, (page 810),

> *"We discussed your informal concern about Mr Rai's observations and comments about your putting a patient on an elective caesarean list, you have drawn the attention of David Woolf, Di Lynch and me to email correspondents about this as you wish to use it as an example of Mr Rai's attitude to you. Currently, Callum Gardner is making a decision on your recent formal grievance, the meeting about which was held on 8 March 2016.*
>
> *My question is what you hope to achieve by the informal grievance about the section list. Two options are for the grievance to be formalised and investigated, which will of course require statements and the perspective of Mr Rai and others involved, which will be*

time consuming and distracting from the current grievance; or, for me to acknowledge your concerns but to act only on the findings from the official grievance Chaired by Callum. I strongly suggest that you follow the second suggestion as this is likely to offer a speedier resolution.

Please consider my suggestions and let me know how you wish to proceed. As you know I am very keen for all of you to undergo facilitated mediation as I think that this is the only way the working relationship can be re-established.

Best wishes, Dr Rege"

56. The letter is very much a plea to resolve matters informally and re-establish good working relationships.

57. The Claimant's response to the above through the Doctors and Dentists Protection Union on 18 April 2016, (page 816), summarises the background to the present complaint and alleges the Trust is failing to follow its own Dignity at Work Policy. Again, it repeats the allegation that the Claimant's department colleagues are harassing and bullying her, she does not want to be pressed into mediation and hopes that matters can be resolved through the Trust's internal processes.

58. On 13 May 2015, the Claimant received the outcome of her formal grievance, (pages 818 – 855), it is clearly a comprehensive investigation and detailed findings and the Final Outcome summary is at (pages 853 – 855), in which some of the Claimant's grievances were partially upheld, some were not upheld. The conclusion, was there was no failure on the Claimant's behalf in her duty of care to support the trainee Doctor and further there was no failure to make appropriate patient records of an expected standard. However, in relation to helping the trainee Doctor with his / her statement to SUI this was dishonest and unacceptable and was therefore partially upheld.

59. On 27 May 2016, the Claimant through the Doctors and Dentists Protection Union, lodges an appeal against the grievance outcome, (pages 859 – 862), the appeal grounds are at page 860 section 4. These can be summarised as follows: Dr Gardner was someone involved in the original SI Report and therefore had a conflict of interest; Dr Gardner's investigation into the SI Report lacks transparency; Dr Gardner gives an appearance of bias, Dr Gardner's decision is inconsistent that he overlooked evidence; and finally, that Dr Gardner rejected some of the grievance by down playing the offending actions as routine and a matter of course without giving any, or sufficient, justification.

60. There then follows, in relation to that appeal, lengthy correspondence about a dispute over what disclosure should be made to the Claimant for her appeal. The Claimant's personal file was disclosed, however, other documents were not disclosed as requested, but in accordance with the

Trust's Grievance and Dispute Policy. As a result of the continuing dispute regarding disclosure, despite the Trust listing a date for the appeal, the Claimant and her representative requested a postponement. The Claimant and her representative appear not to have engaged in the appeal process because they did not think full disclosure had been made by the Trust. The Claimant's appeal against that grievance never came to fruition.

61. On 29 December 2016, a patient undergoes three operations beginning with a caesarean section and is then returned to the Theatre twice due to intra-abdominal bleeding. The Claimant was present at the second operation and Mr Rai was present at the third. The trainee Dr Simpson was present at all three. Apparently, during these procedures the patient lost 4.4 litres of blood and her recti muscles were transected.

62. On 31 December 2016, Mr Rai submitted a Datix report which is part of a common system used in hospitals to report an adverse event. The report, (page 886), reads,

> *"I was called to Theatre on 31 December 2016 at 0650 by the Registrar. I was informed the Consultant had requested me to attend for a second opinion. This patient had a caesarean section on 29 December 2016 and had a broad ligament tear. She had deteriorated and had to be taken back to Theatre for intra-abdominal bleeding. Upon review, the patient had a drain in her abdomen which had filled with 200+ ml of blood within 30 minutes of insertion. I informed the patient that we needed to re-operate as she was still bleeding. I was informed by the night Consultant that the patient had a dehiscence of the posterior uterine wall which had been closed. Upon opening the skin and rectus sheath, I noted that both recti muscles had been completely transected. I continued with my entry and found several bleeding areas in the right broad ligament and those were secured. There was also a bleeding vessel from the right omental edge which we secured. The abdomen was closed in layers, although the muscles were left as the upper portion had retracted from the initial caesarean section. To completion of the third operation the patient had lost 4.4 litres of blood."*

63. The Datix was a factual reporting of what the Claimant had told Mr Rai when he arrived in the Theatre and he reports his clinical observations of the patient. The fact the patient had lost significant blood, Mr Rai identified several bleeding points that he observed when opening up the patient that the recti muscles had been transected, i.e. cut. It makes no criticism of the clinicians involved in the care of the patient. Further, he made no comment on how any of the issues may have occurred or who was responsible. That is not the purpose, in any event, of a Datix report. The relevance of the report is to ensure patient care incidents are properly recorded and investigated as appropriate. They are not about apportioning blame.

64. There then follows a Senior Clinicians Incident Group meeting on 6 January 2017. The Claimant is asked to provide a statement by Mr Havenga by 12 January 2017, as were others involved in the treatment of the above patient. The Trust decide to obtain an external report on the case and a Dr Hillman-Cooper is appointed from outside the Trust (Worcester Royal Hospital). The draft Report was received in May 2017 and circulated to a number of persons in the Trust, but not those involved in the incident for their initial observation. The Report was not sent to Mr Havenga either, although he was not involved in the incident. A meeting was to be arranged to discuss the draft Report with those who had been circulated with the draft and then to be released. The Report was then released to all those involved in the care of the patient on 14 June 2017 following a meeting of the Trust's Risk Team.

65. The Report, at (pages 960 – 980), was critical of the care in general, and highlights several concerns. Particularly that the Team is dysfunctional, communication is lacking in the hand over and clearly that there are lessons to be learned. That also leads on to the Serious Incident Report by the Trust, (page 984), which Mr Havenga circulated the Report on 14 June 2017, (page 958), reiterating the Report does not name the Claimant, far from it, all parties involved, though not named, were in effect criticised. Concluding that there were clearly lessons to be learned. It also confirms that the SI Report has been drafted and will be finalised on the forthcoming Friday and sent off to the patient and the Clinical Commissioning Group.

66. On 16 June 2017, Shaun Fretter Clinical Risk Manager, confirmed the Report has been submitted following approval and it was now too late to recall, a copy has been sent to the patient as part of the Duty of Candour at the patient's request. This followed a request on 15 June 2017 from Dr Rege asking that she be given a week's extension for submission of the Report to the Clinical Commissioning Group.

67. On 15 June 2017, the Claimant had asked the Clinical Commissioning Group for an extension before the Report was sent out. Clearly that was now not possible as the Report could not be recalled.

68. The Claimant had emailed on 22 June 2017, to Dr Rege a detailed response to the expert Report, (page 1034).

69. On 29 June 2017, the Claimant requested the Report to be withdrawn as she claimed it was incomplete in the disclosure of facts, there were inaccuracies and the Report was bias. This was despite the fact the Report was prepared by an external consultant outside the Trust who did not know the Claimant previously.

70. In the early part of 2017 and into the late summer of that same year, there were a cluster of Serious Incidents relating to patients at the Fitzwilliam Hospital. The cluster of incidents of which there were two 'never events'

and eleven serious events, relating to either spinal or gynaecological procedures and were reported to the Clinical Commissioning Group.

71. In respect of the incidents relating to gynaecological procedures, the first of the cluster occurred on 9 February 2017, (pages 130 – 136). The Claimant was not involved in this incident.

72. The second and third incidents occurred on 9 February 2017 and 28 January 2017, but the third was not reported until 21 April 2017, (pages 137 – 144 and 147 – 156). Again these incidents did not relate to the Claimant.

73. The third incident resulted in a laparotomy and hysterectomy for the patient. Apparently a laparotomy involves a surgical incision into the abdominal cavity. This means that the level of harm is greater and the recovery time longer for the patient than if the procedure was managed by alternative means such as a laparoscopy (which involves using a laparoscope to view a patient's internal organ and requires only a small incision and is less invasive, effectively key hole surgery).

74. An investigation was carried out at the time by the Fitzwilliam Hospital. A decision was taken to allow the Consultant to carry out similar procedures on the basis that the patient had been aware that the ultimate complication was a risk of the procedure in the first place and that the issue was noted and addressed during the procedure itself. Furthermore, with this particular Consultant not being the Claimant, there had been no other Serious Incidents during the cluster period. Mr Ranaboldo, Medical Director at the Fitzwilliam Hospital, had raised a number of questions with the Consultant on 14 June 2017 and a response to those questions was received and satisfied Mr Ranaboldo that the Consultant's decision in relation to the procedure appeared to be an isolated incident. Furthermore, that Consultant provided a clear, open and thorough response to the questions which had been raised and therefore the issue was closed. In any event, that Consultant by August of that year decided he would no longer practice at the Second Respondent.

75. In the meantime, a fourth cluster incident occurred on 13 March 2017 which resulted in a long term catheter for a patient, (pages 157 – 164). The fifth incident occurred on 11 November 2016, but apparently was not reported until 26 April 2017 and resulted in a fistula, (pages 375 – 381). Both of these incidents related to procedures which had been carried out by the Claimant.

76. It was clear at this time there had been a number of perforation incidents within the gynaecology department. Whilst accepting that some perforations can be of limited clinical significance, particularly if there is no associated harm during the procedure. It is clear, the fact that there is a perforation incident does not itself mean that the Consultant carrying out the procedure has done anything wrong, or that there is a problem with their practice. Where an incident arises which causes a complication that

is a known complication of the procedure, and where there is no other evidence to suggest an issue in relation to that Consultant's practice, the fact that an incident alone occurs would not normally result in the Second Respondents reviewing that Consultant's practising privileges.

77. However, in respect of a particular cluster of incidents, as of 31 July 2017, Ramsay Healthcare had encountered five in total and only one Consultant, the Claimant, appeared to have been involved in more than one.

78. On 23 August 2017, the Second Respondents became aware of two further incidents. One in relation to a procedure carried out on 18 August 2017, (pages 184 – 206), and another relating to a procedure carried out on 19 August 2017, (pages 615 – 621). These procedures were both carried out by the same Consultant and both resulted in short term catheter for the patient. These were subsequently investigated by the Matron Ms Groom who reached the conclusion that the complications were known, the patient had consented to the risk and there were no other issues with the Consultant's practice.

79. However, the fact that Ramsay Healthcare had now reported a number of Serious Incidents to the Clinical Commissioning Group over a relatively short period of time, ultimately created a concern with that Group which could affect the Second Respondent's ability to continue to provide certain NHS services.

80. The Second Respondents were therefore, requested by the Clinical Commissioning Group to attend a Quality Assurance meeting on 24 August 2017, to discuss the cluster of Serious Incidents which included both the gynaecology and spinal cases. Mr Ranaboldo, Miss Heckford, Mr Cottam and Ms Groom all attended on behalf of the Second Respondent. There are minutes of that meeting at pages 2017 – 214. It was decided at that meeting that the Second Respondents would commission an external review of the gynaecological services and that the Second Respondent should engage the services of the Royal College of Obstetricians and Gynaecologists. It was clear that the decision to commission an external report was being driven by the CCG.

81. On 5 September 2017, a further Serious Incident came to the Second Respondent's attention when it was reported by a patient. The patient in question had attended the Fitzwilliam Hospital for a procedure to treat endometriosis which had been carried out by the Claimant. Apparently, during the procedure the patient suffered two perforations to her colon. These were not detected at the time. The patient was discharged and later readmitted to a local NHS hospital. Whilst there the patient underwent emergency surgery which ultimately resulted in a colostomy. Clearly that is a potentially life changing event for the patient. A preliminary investigation was carried out in relation to this incident, (pages 237 – 241).

82. Mr Ranaboldo was concerned to hear about this incident given events of the preceding months, due to the level and magnitude of harm suffered by

the patient. This resulted in a Report having to be made to the Care Quality Commission and the ECCG and the Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

83. The second reason Mr Ranaboldo had become concerned about the Claimant's practice, was this was now the third Serious Incident linked to her practice over a relatively short period of time. Mr Ranaboldo was also concerned that the Claimant appeared not to have been aware during the third procedure there had been two perforations of the patient's colon. Finally, Mr Ranaboldo was also concerned as in the previous years of the Claimant's practice, there had been no previous patient injuries, or at least not serious injuries.

84. Given the fact that of this further incident, the Second Respondents would have to report to the CCG. At the same time the Second Respondents were already under scrutiny as a result of the cluster of incidents within the gynaecological department, and there may be a potential consequence regarding the Second Respondent's contract with the NHS.

85. Mr Ranaboldo therefore spoke to Ms Heckford Director of Clinical Services and Mr Hoile the Responsible Officer at the Second Respondent, about the incident on 5 September 2017. Ms Heckford, at the time being on leave in Australia, therefore the discussion was by telephone. It was agreed more information about the background of the incident itself was needed. The second telephone conversation took place later that evening as to how best to proceed. The ultimate decision as to what action was to be taken, was with Mr Ranaboldo. Mr Ranaboldo formed the view that there may well be an issue with the Claimant's practice, given a developing pattern of incidents which had led to long term health issues such as a catheter and fistula for the affected patient and the fact the most recent incident was the third in a relatively short period of time. Mr Ranaboldo therefore took the decision, as Group Medical Director to restrict Ms Gumma's practising privileges and allow her to carry out only follow up appointments. The effect was the Claimant would no longer undertake any further surgical procedures and would no longer see new patient referrals.

86. Normally under the Second Respondent's facility rules, this decision to restrict practicing privileges would be taken by the General Manager Mr Cottam following consultation with the Chairperson of the MAC, the Regional Director and the Group Medical Director, which would be given by notice in writing. However, at the time Mr Cottam was away on holiday and given the urgency of the situation, Mr Ranaboldo as the Group Medical Director, in consultation with others, took the decision in the absence of Mr Cottam, (R2, page 95).

87. The decision was clearly taken having regard to the overriding interest any hospital must consider in relation to patient care and safety. Such a restriction was not intended to be permanent, but needed to be put in

place until the Second Respondent had, through their external investigators, received a full Report.

88. What is clear, is Mr Ranaboldo's decision was taken entirely within the confines of the Second Respondent and the matter prior to restricting the Claimant's practicing privileges was not discussed with Mr Sriemevan, Mr Havenga and Mr Rai. Furthermore, it is clear none of those individuals were aware of the proposal to restrict the Claimant's practicing privileges until after the decision had been made by the Second Respondent.

89. After the decision was made it is communicated to the Claimant on 5 September 2017 by Mr Ranaboldo, (pages 216 and 221). The letter confirmed that the Second Respondents were commissioning an external review of the gynaecology services at the Fitzwilliam Hospital. Mr Ranaboldo would be asking for the Claimant's practice to be reviewed, although subsequently it was decided it would be more appropriate to ask the Royal College to review the practice of all the Consultant Gynaecologists rather than just that of the Claimant. In that letter, the Claimant was asked to provide her whole practice data for the previous three years for all the hospitals in which she worked, including all adverse events relating to Theatre and adverse outcomes. Mr Ranaboldo subsequently requested the same information from all of the Consultants within the Gynaecological Department at the Fitzwilliam Hospital.

90. On 5 September 2017, Mr Ranaboldo emails (page 1053) Dr Rege at the First Respondents being the Claimant's Responsible Officer / Line Manager, to advise the Claimant's practicing privileges had been restricted at the Second Respondent and providing her with a copy of the letter sent to the Claimant (page1054). Clearly, Dr Rege had no influence in that decision prior to that decision being made and clearly the first she was aware of it was on 5 September 2017 at 1359hrs.

91. There was a meeting between the Claimant and Dr Rege on 6 September 2017, at which the Claimant was informed that in order to protect patient safety, she was going to restrict the Claimant's gynaecological surgery at the Trust and mirror the restrictions with the Second Respondent. It appears at that stage the Claimant understood the reasons and confirmed she was happy to do Clinics and Obstetrics during the period of her restriction.

92. Following the above meeting, Dr Rege on 6 September 2017 emailed Fran Stephens, Head of Midwifery and Nursing, Mr Havenga, Mr Woolf and Ms Lynch and sumarised the conversation with the Claimant, (pages 1062 – 1063). The reason why these individuals had to be informed of Dr Rege's decision was because they were collectively responsible for delivering Maternity Services; Mr Havenga was the Associate Clinical Director for Obstetrics. Mr Havenga then emailed Mr Rai, the Associate Clinical Director for Gynaecology, Mr Sriemevan the Rota Co-ordinator and the Theatre booking Clerk to update them. Clearly, they were entitled to know of the decision and in fact needed to know of the decision. At the same

time, Mr Ranaboldo was informed as to what was going on at the Trust by Dr Rege.

93. On 7 September 2017, Dr Rege meets again with the Claimant to discuss the implications of the Second Respondent's decision to restrict practising privileges. That meeting is confirmed in writing by Dr Rege, (page 1353), on 7 September 2017, in which Dr Rege comments that the Claimant had understood the reasons for the restriction placed on her by the Fitzwilliam Hospital.

94. On 8 September 2017 (page 1067), Mr Havenga emails Mr Ranaboldo requesting a call concerning the Claimant. Mr Ranaboldo confirms a telephone conversation took place, although he made it clear he was unable to discuss the Claimant and the telephone conversation was very short and brief.

95. It was on 8 September 2017, Dr Rege emailed the Claimant to inform her that she had now decided to extend her restriction to seeing new gynaecological cases in Clinic, otherwise she would be booking cases for other surgeons to ultimately operate on. The reason for this was that if the Claimant was booking operations for colleagues, there was a risk that when the patient arrived for surgery the Consultant scheduled to do the operation might disagree with the Claimant's clinical judgment and as a result the patient would be unhappy and resources would be wasted. This clearly had nothing to do with the Claimant's gender.

96. On 14 September 2017, following Mr Havenga's letter on 13 September to Dr Rege setting out his concerns about the Claimant's competence, (page 1078), a meeting took place with Dr Rege, Mr Woolf, Ms Stephens, Mr Rai and Mr Havenga. The meeting had been called by Mr Havenga and Fran Stephens to discuss the extent of the Claimant's restrictions and how her clinical work could be appropriately covered while she was restricted. The letter that Mr Havenga had sent to Mr Rai, dated 13 September 2017, had indicated that Mr Havenga, Mr Rai, Mr Sriemevan, Mr Ramsay and Ms Stephens all agreed that they had concerns about the Claimant's clinical judgment and this applied to all of her operating, including obstetrics

97. Following the meeting with Dr Rege and a colleague on 14 September 2017, Dr Rege reflected on the Claimant's restriction and concluded that as it stood it was not logical, the reason being to allow the Claimant to do 'on call' would mean that she would require to deal with both obstetrics and gynaecology. Dr Rege therefore took the decision to restrict the Claimant's practice further such that she could only undertake General anti-natal Clinics, Diabetic ante-natal Clinics, Ante-natal Day Care Unit, as well as audits, guidelines and teaching on the non-clinical side.

98. Dr Rege emailed the Claimant on the same day 15 September 2017, to ask the Claimant to come and see her to discuss the restrictions (page 1086). Having tried to call the Claimant and to leave a voice mail, the

Claimant did not respond. Later that afternoon, Mr Havenga informed Dr Rege that the Claimant had telephoned in sick at short notice.

99. In the meantime, on 19 September 2017, Dr Hamilton (female) Deputy Medical Director at the Trust and a Consultant in Obstetrics and Gynaecology, was instructed to conduct an initial assessment of evidence regarding the Claimant's clinical practice based upon the PPA advice (page 1098). Dr Hamilton was asked to review the notes of 30 cases; 10 from 2015, 2016 and 2017, from both the Claimant's Gynaecology and Obstetrics practices. Dr Rege informed Dr Hamilton that the cases would be selected at random and asked her to provide a Report by 30 October 2017.

100. On 26 September 2017, (R2, page 294), the Claimant emailed Mr Cottam at the Second Respondent saying she was now shocked to have received a letter from Mr Ranaboldo restricting her practice without prior discussion and felt that she had been discriminated against citing her colleague having had no action taken against them in circumstances where she alleged they had a higher number of complications overall. The Claimant was specifically asked by Mr Ranaboldo on 26 September 2017 in an email (R2, page 294), that if she believed she is being discriminated against, she must provide the evidence. Despite specifically being requested by email of 27 September 2017, (R2, page 299), the Claimant simply did not respond or provide any evidence to Mr Cottam or Mr Ranaboldo with detail of how, when and by whom she was being discriminated against.

101. In the meantime, on 7 September 2017, Dr Rege sought advice from NCAS, the National Clinic Assessment Service, and further advice is given to Dr Rege on 19 September 2017. In effect, the investigation into the Claimant's clinical practice came about as a result of advice from NCAS.

102. Also, in the meantime, the Claimant's Medical Protection Union had been writing to Dr Rege questioning the basis of the restriction on the Claimant's practice. Dr Rege replied to this on 6 November 2017 (page 1130), confirming the reasons for the restriction of the Claimant's practice in response to a restriction imposed by the Medical Director of the Ramsay Fitzwilliam Hospital. She goes on to explain that initially the Claimant's practice had only been restricting gynaecology, but on further discussion from within the team, the decision was taken to restrict her practice in obstetrics since the two are inextricably linked. Dr Rege goes on to advise that she had taken advice from NHS Resolution, formerly NCAS, who had suggested an initial fact finding review of the Claimant's practice.

103. On 27 September 2017, in an email from Mr Ranaboldo to all Gynaecologists working at the Fitzwilliam Hospital, they were notified that a review of the Gynaecology Service as a whole and individual Consultant practices was to be reviewed externally by the Royal College of Obstetricians and Gynaecologists, (page 304).

104. On 30 September 2017, (page 309), Mr Rai emailed Mr Cottam copying in the relevant parties at the Second Respondent, confirming he had no issue with the external assessors coming to observe his practice and to investigate Serious Incidents. In that email he raises historical issues relating to the Claimant, in particular the vaginal mesh incident. He suggests historical incidents should be looked at as well as incidents that occurred in recent months. Mr Cottam responds on 2 October 2017, confirming that the Royal College will focus on recent cluster incidents and that previous historic incidents investigated at the time, were not be included or be within the scope of the external review.

105. There is evidence that the First Respondent supplied the Datix and Serious Incident information to the Second Respondent as part of their review. In addition Mr Ranaboldo had requested the Claimant provide the data in respect of her work and complications at the First Respondent. which she duly did.

106. On 21 September 2017, (page 1108), Dr Suzanne Hamilton reports to Dr Rege from what she had already seen, there was concern over the Claimant's obstetric management as well as her gynaecologic decision making. There was also concern raised over the Claimant's operating ability, thus Dr Hamilton was suggesting restrictions extend to obstetrics as well. Accordingly, Dr Rege on 21 September 2017, wrote to the Claimant confirming that the restriction of her obstetric practice had been discussed with the Team and it had been agreed should remain in place. The Claimant was also advised this had been confirmed by Dr Hamilton, the Consultant Obstetrician and Gynaecologist.

107. On 6 October 2017, (page 1115), Mr Sriemevan emailed Mr Cottam to express a number of concerns he has noted with the Claimant's practice. It should be noted that he gave the reference for the Claimant at the outset when she applied for her privileges to practice at the Fitzwilliam Hospital. Mr Sriemevan goes on in that email to give specific examples of his concerns regarding the Claimant's capability, all of which had been previously documented. One in particular is an occasion where the Claimant was operating at the Second Respondent's when she was supposed to have taken over a duty from Mr Sriemevan at the First Respondent. This was on 17 August 2017. Mr Sriemevan had in fact called the Claimant on her mobile to enquire where she was and she indicated was late because of child care issues – the handover was approximately one hour late. Mr Sriemevan, when attending the following week at the Second Respondent's was informed by Theatre staff that when he had spoken to the Claimant far from having child care issues she was operating at the Second Respondent's.

108. On 15 October 2017, Mr Ranaboldo writes to the Claimant, (page 1117), setting out what he sees as a background to her work. In particular, he comments up until the last twelve months, the Claimant had been free of visceral injury which he confirms was commendable. However, in the last year there has been a cluster of serious complications which he linked to

the increase in workload and the number of patients the Claimant is now seeing at the Fitzwilliam Hospital and wonders whether this might be a contributory factor. The Claimant is asked to check the data for any errors that Mr Ranaboldo has included in the letter.

109. On 20 October 2017, (R2, page 337), the Claimant responds to Mr Ranaboldo enclosing her surgical data, questioning Mr Ranaboldo's assessment of the Claimant's practice and his data. The dispute appears to be that the Claimant provided data going back to 2009, whereas Mr Ranaboldo as was always proposed, has assessed the data over the previous three years.

110. Mr Ranaboldo's response, (R2, page 347), to the Claimant on 20 October 2017 reads,

> *"Thank you for your email. I note your comments. We have a cluster of patients who have suffered injury. They are not just your patients but you have the greatest number with the most severe consequences. I appreciate that the numerator had a considerable impact on the interpretation of the data. To understand what these data mean, we are commissioning a review by your College who will examine all of your colleagues' practices in the same way. Dr Rege has agreed that the Trust data will be included equally. I will be guided by the outcome of the Review."*

111. Following the Quality Assurance meeting on 24 August 2017, at the request of the Clinical Commissioning Group in which they had requested some form of review into the series of incidents and clusters that had occurred and on 22 October 2017, Mr Cottam having prepared jointly with Matron Ms Groom, the Governance Review into Serious Incidents Report to the Commissioning authority, (pages 349 – 367). That Report confirmed actions and lessons learned,

- *"Miss Gumma has had her practice restricted, as she had been involved in three perforation incidents;*
- *A further investigation into the Consultant's practice has been commissioned by the Royal College of Gynaecologists which is expected to commence in November 2017;*
- *All gynaecology Consultants are being invited to a meeting to discuss the perforation;*
- *The Fitzwilliam Hospital is exploring the introduction of a speciality MDT for Gynaecology, the Medical Director is organising a special hour team meeting for all Gynaecologists at the Fitzwilliam Hospital;*
- *The CQC inspection included a specialist advisor for gynaecology who reviewed the patient notes in detail during the inspection and the final Report is pending*."

112. On 28 November 2017, Dr Rege received an email from the Claimant in which she stated that she had found it difficult to understand why she had

been suspended from gynaecological and operating practice, whereas her colleagues Mr Havenga, Mr Sriemevan, Mr Rai and Mr Ramsay in her view have had more complications resulting in significant harm for patients and had not had the same restrictions from management, (pages 1301 – 1309, 1352). The email went on to say,

> *"As these Consultant colleagues have been continuing to practice, I would like to request you to do the needful action to protect the patient safety.*
>
> *For the fear of reprisal, I would like to request you to protect my anonymity."*

113. Attached to this email, there appeared sensitive personal data relating to 78 patients who are identified by their Hospital Number or their NHS number (page 1302 – 1309). Each number was accompanied by a brief description of a surgical complication and the name of the Surgeon involved. The only Surgeons on that list were Mr Havenga, Mr Sriemevan, Mr Rai and Mr Ramsay.

114. It was at that point Dr Rege believed this could potentially be considered Whistle Blowing as the Claimant was raising concerns regarding patient safety. As Dr Rege reviewed the Trust's mortality and procedure related data at the Quality Governance Operational Committee every month, she was not aware of any particular concerns in relation to obstetrics and gynaecology. Dr Rege was also concerned that some of the data pre-dated the Claimant's employment at the Trust and appeared to be focused on only four Consultants with whom Dr Rege was aware the Claimant had a difficult relationship with. It was also noted by Dr Rege that there were duplicates on the list. Dr Rege was concerned that the Claimant may have used Trust systems to look at patient's confidential data to try and substantiate her allegations of poor practice against her colleagues to aid her own case in comparison.

115. On 29 November 2017, Mr Ranaboldo, having observed Mr Sriemevan in the Theatre on 28 November 2017, [which would not be unusual for a Group Medical Director], emails Mr Sriemevan simply thanking him for allowing him to observe in Theatre yesterday and that he was reassured observing his practice as Mr Sriemevan is the representative on the MAC committee for the Second Respondent. Mr Ranaboldo then requests he co-ordinates and agrees the time for all colleagues to meet the RCOG Review Team and arrange an appropriate timetable for their interviews.

116. In the meantime, on 28 November 2017, Mr Ranaboldo sends to Dr Rege the Terms of Reference for the forthcoming RCOG Review, (pages 468 – 469), not surprisingly Dr Rege and Mr Ranaboldo kept each other informed as to matters and progress and it would appear the restrictions remain in place until the outcome of the Review and those restrictions would apply equally to both the First Respondent and the Second Respondent.

117. The Claimant meets with the RCOG Review Team on 7 December 2017, during the course of which the Claimant hands over the patient list which contains confidential personal data relating to other colleagues' complications, which was against the advice of the Review Team. Notwithstanding this advice, she insisted in handing over the list. There is some discrepancy as to what she told the Review Team as to how she obtained the list, particularly as it only had complications in relation to her colleagues and none in relation to herself. The minutes of the meeting between the Review Team and the Claimant (R2 page 1042), record she says the list was given to her anonymously, whereas under cross examination she was adamant that she had created the list herself and had never said it had been handed to her anonymously. (Even her own representatives' minutes of that meeting does not corroborate what the Claimant says she said at the meeting).

118. It would not be surprising that during the course of the RCOG's interview with the Claimant's colleagues that when they were asked whether they had any specific concerns about Consultants in that department who appeared to have the patients' interests at heart, they would volunteer their concerns about the Claimant's management of patients within her care.

119. On 11 December 2017, Mr Ranaboldo provided feedback regarding the College visit to Dr Rege (R2, page 505), in which he comments that there were no major concerns other than the working relations between colleagues and he was not planning to progress matters until Dr Rege returned from leave and an agreed way forward had been discussed. It is also clear by this stage that Dr Rege, in an email to Mr Ranaboldo, had indicated that a female had anonymously handed a dossier of NHS complications about NHS Trust Surgeons to the panel conducting the review and it was noted further that there were no complications by the Claimant documented within that list.

120. On 14 December 2017, Mr Ranaboldo emailed the Claimant confirming that,

> *"The provisional verbal feedback from the Royal College visit of last week is satisfactory."*

121. Mr Ranaboldo also stated he was waiting for the formal conclusions and written report and will discuss them with Dr Rege as soon as they are received. He also confirms he is unable to give a specific date for when the written report will be received. In the meantime, the Claimant's practicing privilege is not lifted at either the First Respondent or the Second Respondent; pending the outcome of the formal review in writing.

122. On 19 December 2017, Dr Rege emails the Claimant (page 1351),

> *"Many thanks for this important information* [reference to the list] *which I take extremely seriously, may I ask you how you came across the data?"*

123. The Claimant responds on 22 December 2017 to Dr Rege, (page 1351),

> *"As requested in my letter, I would like my anonymity to be protected. I note that in your email you have not given any assurance in respect of this. I have been repeatedly targeted in the past with no protection from management, I would like you to guarantee my anonymity before I provide any further information.*
>
> *As indicated in my letter, I believe that my restrictions are unjustified and I would like these to be lifted."*

124. Dr Rege responds on 29 December 2017 (page 1351),

> *"I have not disclosed your identity to anyone in this respect. There is no need for anyone to know your role in this. I will await your formal outcome of the RCOG review before I consider lifting your restrictions.*
>
> *As I expressed in my previous email, I would like to know how you acquired this information."*

125. The Claimant does not appear, certainly not that the Tribunal has seen in the Bundle, to have responded to Dr Rege's request as to how she came about the list at this stage. Indeed, the request to the Claimant as to how she came upon the list was reiterated on 31 January 2018, (page 1349).

126. On 1 January 2018, Dr Suzanne Hamilton's Report into the Claimant's clinical practice becomes available, (pages 1158 – 1171). The conclusion being at page 1171, said,

> *"The review examined a random selection of gynaecological and obstetric cases over a three year period. In general Ms Gumma's gynaecological management was of an acceptable standard apart from the issues specified above. The management of obstetric cases, particularly complex cases, appeared to be at a level below that expected of a Consultant."*

127. To be clear, the Report was by Dr Hamilton who was a female Consultant Gynaecologist and Obstetrician.

128. Dr Rege then informed NCAS on 3 January 2018 that an internal review of the Claimant's practice had been completed and that some issues had been found which were of concern. NCAS also were advised that a review

was being conducted of the cases contained in the list the Claimant provided of patient data, (page 1146).

129. On 11 January 2018, Mr Ranaboldo reports to Dr Rege that he is still waiting for the written report and that is expected in two to three weeks, pending that the Claimant suspension will remain. He also confirms that the list that the Claimant provided of complications of other surgeons had now been passed to the Care Quality Commission.

130. On 13 January 2018, Mr Ranaboldo emails the Claimant confirming it is his wish to conclude matters in relation to the review and it is hoped that the Report is expected shortly. He does make the point that the list of other adverse events that the Claimant had passed to the team is now causing a delay and that as the list has been passed to the CQC, Dr Rege is now having to address those matters as well.

131. On 25 January 2018, Dr Rege writes to Mr Havenga, Mr Ramsay, Mr Rai and Mr Sriemevan advising that she had been handed a list of patients who had suffered complications from their care going back a number of years. The list was given anonymously and it was agreed not to disclose the identity. She went on to say she had to take these concerns seriously and she would be making a retrospective study of all of the Consultants' work using information from the IT systems, medical notes and advice from the RCOG, (page 1154).

132. On 6 February 2018, Dr Rege emails the Claimant reasonably asking her to come and see her the following day and confirming that she could bring a friend or colleague to the meeting. The purpose of the meeting was to discuss the Desktop Review of her practice and also how she came to know about the cases of her colleagues, which the Claimant had alerted Dr Rege to in November 2018. The Claimant's return to work in February having been on sick leave since September 2017, her response was that she was seeking advice from her defence Union and would revert to Dr Rege in due course.

133. On 7 February 2018, the Claimant informs Dr Rege that she was unwell and unable to come to the meeting and then commences a further period of sickness absence, (page 1183). The Claimant still has not confirmed to Dr Rege exactly how she came across the list of patient complications in relation to other Consultants.

134. On 12 February 2018, Dr Rege writes to the Claimant following the Claimant being unable to attend the meeting and provides the Claimant with a summary in respect of the restrictions from performing gynaecological surgery, a Desktop Review of gynaecological practice and obstetric practice, the Claimant accessing patient medical records and that in accessing patient records this action needs to be investigated further under the MHPS framework. She also advises the Claimant that she may make representations about the investigation to the designated Board Member Mrs Dunnett, at any time after receipt of this letter. The letter also

attaches to it the Terms of Reference for the investigation under the Maintaining High Professional Standards in the modern NHS Framework.

135. On 12 February 2018, at the same time Dr Rege enclosed a copy of Dr Hamilton's review of the Claimant's practice.

136. Furthermore, had the Claimant arranged a meeting with Dr Rege, she could have commented on the findings of Dr Hamilton, which were the reasons for a management plan to be developed for the Claimant. However, that seems to have been overtaken by concerns regarding how confidential patient data had come into the possession of the Claimant. Dr Rege's view was that these issues needed to be resolved before matters could move forward.

137. On 15 March 2018, (R2, page 571), the Royal College review of the Gynaecological Services at the Fitzwilliam Hospital, it was finally sent to Mr Ranaboldo following a number of chasing emails to the College to expedite the Report. The Report is at pages 572 – 592; specifically the recommendations are at page 592. The Report's recommendations were in many ways critical of a number of aspects of the running of the Fitzwilliam Hospital and the need to improve facilities and services. It was also critical of making sure that Clinicians explore more conservative treatment options with patients, making sure appropriate written materials supporting these discussion are supplied to patients, with a recommendation of referring patients to the local NHS Hospital to receive less invasive treatment or procedures. It also commented on the fact that working relationships between the Consultants were alarming and the fact that the Gynaecologists in Peterborough appear to be divided into two groups with two Consultants forming one group and the remaining Consultants forming another. There were also insinuations about probity issues relating to the Claimant. However, the only evidence that the assessors observed in relation to this was with regard to an inaccurate Operation Record payment coding involving an ovarian cyst. There was concern also about an incident about a retained swab that had not been mentioned when an individual was given ample opportunity to raise this.

138. What does come out of the Report is concern that the Claimant had submitted a list of eighty eight cases to the reviewers at her meeting with the assessors, these had been collated from the First Respondents. The fact the Claimant had indicated these had been given to her anonymously and the fact that the list included names of Surgeons and patient Hospital numbers. The assessors having informed the Claimant this was not part of the terms of the review and that the Claimant was not following the appropriate channels for Whistle Blowing which could represent a significant breach of data protection. Notwithstanding this, the assessor's record that the Claimant insisted that the list was accurate and that the assessors should keep the list.

139. It would appear, had the Claimant not disclosed the list, there was every chance that she would have had her restriction from practice lifted at this

point as clearly there were no major concerns about her practice, or indeed any other Consultant's practice and their probity.

140. On 19 March 2018, (page 1310), the Claimant then provides a statement to Dr Rege about how she had come about the list of patients' data and record of complications. In that statement, the Claimant said,

> *"…brought what she considered to be evidence of patient harm to* [my] *attention in good faith as a whistle blower in circumstances where* [she] *was concerned that if the Trust was properly investigating patient concerns within the obs and gynae department, it was essential to have the full picture and not a limited look…"*

141. She then went on to state, having reflected on the issue, she accepted that on occasions her accessing of patient data,

> *"…may not have been properly or fully authorised".*

She suggested this was a practice followed by other colleagues. The Claimant asserted there had been widespread abuse of clinical governance processes to pressurise her and that because of an atmosphere of fear and distrust, she had begun to keep a list of complications of colleagues. The Claimant went on to explain that she had disclosed the list to Dr Rege in November 2017,

> *"…so that* [I] *would know that there had been breaches of governance in the past which impact the figures (as I believe these might be used for comparison with my own figures and the reflection would be unfair and to my detriment) and because of the abuse of governance, the accuracy of the complication rate, records of different Consultants are not comparable."*

142. Finally, the Claimant stated that her decision to provide the data to the Royal College Review was a defensive and protective step given what had happened to her since 2012. At this stage the Claimant, for the first time, offered a full, frank admission as to how the list came about and an apology.

143. On 23 March 2018, Dr Rege emails the Claimant to acknowledge receipt of her statement and asked that the Claimant come to see her on 26 March 2018 confirming that she could bring a companion. On 24 March 2018, Dr Rege receives a letter from the Claimant stating that she was still not feeling well and was now signed off until 18 April 2018. It was subsequently agreed that the meeting would take place between the Claimant and Dr Rege on 19 April 2018.

144. In the meantime, Dr Rege emailed Mr Pickersgill at the RCOG, which was copied to Mr Ranaboldo, to let them know the outcome of the Desktop Review which had been undertaken by Lesley Crosby (pages 1197 –

1198) in respect of the 80 patient records submitted by the Claimant. Dr Rege having reviewed the cases, was satisfied that there was no evidence of either an individual or systematic failure of governance in respect of the cases which had been highlighted and there were further no concerns regarding either capability or conduct in respect of the four Consultant Gynaecologists which had been identified in the Claimant's list. Dr Rege concluded that any further expert opinions were not required from the RCOG. The email was forwarded to Jo Bennis so feedback could be given to the CQC (page 1197).

145. On 10 April 2018, Dr Rege spoke to Mr Ranaboldo to discuss the progress of the obstetrics and gynaecology investigations. She then sent Mr Ranaboldo a list of the NHS numbers for whom the Trust did not appear to hold clinical records so that he could check whether these patients were treated at the Second Respondent's.

146. On 13 April 2018, Dr Rege emailed Messrs Ramsay, Sriemevan, Rai and Havenga to let them know that the patient records attached to each of their names had been reviewed and there was no evidence of either individual or systematic failures of governance and that there was a good level of documentation and clinical candour demonstrated over the relevant period (pages 1209 – 1212).

147. On 18 April 2018, Dr Rege emailed the Claimant to confirm she wanted to discuss the position at the forthcoming meeting regarding the accessing of patient medical records and that this would be a discussion as to the current procedural position in Dr Rege's capacity as Case Manager and would not be part of the investigation.

148. The Claimant did attend the meeting with Dr Rege on 19 April 2018, (minutes of that meeting are at pages 1224 – 1228). The Claimant was accompanied by her Union Representative and Dr Rege was supported by HR. The Claimant has provided a separate note of the meeting which did not accord with the notes of Dr Rege.

149. It was explained at that meeting on 19 April 2018 that Dr Hamilton's review had found there were some issues with the Claimant's clinical practice. It was also explained that Mrs Crosby of the Trust's Risk Team, had looked into the cases highlighted by the Claimant and was unable to find any evidence of issues with governance, capability, or evidence of systematic failures. Dr Rege explained that it was necessary to investigate how the Claimant accessed the information, given the patients' right to privacy not to have such information used for secondary purposes.

150. The Claimant was then interviewed as part of the investigation into her accessing of patients' records by Mrs Wilkinson on 19 April 2018. The minutes of those meetings are at pages 1293 – 1300. The Claimant was represented by her Union advisor and an HR Consultant was there assisting Mrs Wilkinson.

151. During the course of the investigation, the Claimant provided various reasons why she had compiled the list. She says it started following an informal meeting with Mr Havenga the Lead Clinician in September 2012, suggesting that he had told her he had been given a list of patients where complications had alleged to have occurred under her care. The Claimant then went on to say she accessed a shared drive list of complications and some of the cases on her list came from the shared drive. She was asked who, by way of other colleagues. were keeping a list and she declined to name any Consultant who might be keeping a list. She went on to say that,

> *"…the list of 78 cases that I made was compiled using the shared drive data, hand over details when on call, information from trainees, ward and theatre staff and the CLAEP reports."*

152. The Claimant admitted she had not personally validated the data. The Claimant accepted the entries went back many years. The Claimant confirmed that she had no authorisation or legitimisation for compiling a list of complications for gynaecological patients. She accepted she had not been involved with any Clinic audit of complications. The Claimant accepted and admitted that she was aware of the National and Trust Policies relating to information, governance, data protection and patient confidentiality, but argued she did not have a clear understanding of the rules. Nor did she ask the permission of patients to use their personal data. The Claimant was unable to provide a hundred per cent guarantee that she had not only accessed the information, but printed it off as well.

153. The same day, the Claimant provides Mrs Wilkinson with a chronology of events that go back to 2009 (pages 1322 – 1333).

154. Following the Claimant's meeting with Dr Rege on 19 April 2018, she wrote to the Claimant on 20 April 2018 confirming that having discussed the matter, the Chief Executive, the Deputy Chief Executive and the Acting Director of Workforce had decided to formally exclude the Claimant for an initial period of four weeks in order to protect the interests of patients and to ensure the investigation into how the Claimant had obtained the patient data disclosed to her, was not hindered in any way (pages 1227 – 1229). The Claimant was reminded of her right to make representations about her exclusion to the designated Board Member, but apparently no such representations were ever made.

155. In the meantime, the Second Respondents had been made aware of a number of patients on the Claimant's list which did not relate to patients at the NHS Trust. The Claimant had been asked by the Second Respondent to respond and by 4 May 2018, Mr Ranaboldo was confirming to Dr Rege that they were still waiting an answer to those issues raised with the Claimant. He commented they thought she had breached data protection confidentiality. That appears to have crossed with an email to Mr Ranaboldo (page 669) from Dr Rege that the Claimant had been excluded

from the Trust until 17 May 2018 in the first instance and the reason for that exclusion.

156. In the meantime, background enquiries were being made of the Claimant regarding complaints and concerns regarding two patients that the Claimant had care of at the Second Respondent's. Although the Claimant had provided comments for both cases, the comments in respect of both of the patients merely stated the facts of the cases and did not provide the Second Respondents with the Claimant's answers to the specific enquiries that had been asked of the Claimant.

157. On 18 June 2018, by letter to the Claimant's representative at Medic Law Limited, the Claimant's practicing privileges at the Second Respondent are now formally terminated by Mr Ranaboldo and he sets out nine reasons why that decision has been taken (page 731).

158. On 14 September 2018, the Report of the investigation into the allegation that the Claimant had breached information governance. (The Report is at pages 1242 and its conclusions are at 1276 – 1278). By any objective assessment, this is a very detailed and comprehensive investigation into the allegations. There was a further allegation that the Claimant had failed to follow a reasonable management instruction in respect of Dr Rege's request that she attends a meeting in February.

159. The summary and conclusions show that it was not clear how the Claimant had accessed data for inclusion on the list in the majority of cases and she was apparently unable to recall the method by which she sourced the information.

160. The Claimant had admitted she had accessed patient records which she was not involved with in their care and did this without the patients or Trust's express permission and that with the exception of a few episodes of care, she appeared to have breached Section 13 of the Trust's Policy for Storage and Safeguarding of case notes in the majority of cases on the list.

161. Further, that there was no legitimate reason for accessing the patients records and that she appeared to have breached data protection requirements under good medical practice, Clause 20. There were further alleged breaches of good medical practice. The access represented a breach of GMC Guidance on Confidentiality and Good Practice in Handling Patient Information.

162. Further, the evidence supported the view that the Claimant appeared to have breached Section 55 of the Data Protection Act 1998 when accessing the data used in compiling the list of surgical complications, without the consent of the Trust, or Data Controller.

163. Further, that the evidence suggested that the Claimant's access to patient's records represented unauthorised and inappropriate access.

164. The fact that the Claimant's concerns about anonymity did not appear to offer sufficient rationale for declining to provide the Medical Director with information as to how she sourced the data about surgical complications experienced by patients. Her refusal to provide the requested information confirms the Claimant's lack of understanding of the requirements of confidentiality and the legal framework associated with the Data Protection Act and information governance as outlined by the Trust's Policy and detailed in Section 6 of the Investigation Report.

165. The fact that the Claimant failed to respond to requests for information from Dr Rege on 19 and 29 December 2017 and 31 January 2018 as to how she had obtained the patient data, appears to constitute a failure to follow a reasonable management instruction.

166. Finally, in respect of the Claimant's failure to attend the meeting with Dr Rege on 7 February 2018, appeared to amount to a failure to follow reasonable management instruction.

167. On 3 October 2018, the Claimant is sent a letter (pages 1533 – 1535) confirming that based on the enclosed Investigation Report, the matter is to proceed to a Disciplinary Hearing, specifically in respect of whether the Claimant's actions in accessing the personal data of patients identified in the Claimant's email of 28 November 2017, represented various breaches under the Trust's Policy for Storage, Good Medical Practice, breach of GMC Guidelines, a breach of Section 55 of the Data Protection Act 1998 and generally otherwise unauthorised and inappropriate access to patient records.

168. Further, the allegation that the Claimant failed to respond to three specific requests from Dr Rege as to how she obtained the patient data.

169. Finally, there was a further allegation that the Claimant failed to follow a reasonable management instruction by not attending the meeting on 7 February 2018 with Dr Rege.

170. The letter went on to inform the Claimant that the Disciplinary Hearing would be held in accordance with the Trust's Disciplinary Policy and a copy of that Disciplinary Policy was enclosed with the letter.

171. The Claimant was informed of her right to be accompanied by a fellow employee; Trade Union Representative; an Official or Lay Representative of the British Medical Association, the British Dental Association or Defence Organisation; or a friend, partner or spouse.

172. Furthermore, the Claimant was informed if the above allegations were proven they could potentially represent gross misconduct and may result in the termination of the Claimant's employment without notice or pay in lieu.

173. The letter was signed off by Dr Rege, the Claimant's Medical Director and Responsible Officer at the time.

174. A Disciplinary Hearing had been arranged for 3 and 4 December 2018 and the Claimant was notified of this in writing on 26 October 2018. That was postponed and there was an Occupational Health Referral some time in October, with a short Report on 30 October 2018 (page 1538). That indicated that at the present time the Claimant was not fit to attend the Hearing and asked that the matter be deferred for a month until early January in order to give the necessary time for the Claimant to recover and thus a fair hearing take place.

175. There was an Occupational Health review of the Claimant on 4 December 2018 (page 1539). In the updated Report, it was agreed the Claimant was unable to attend a Disciplinary Hearing in December, but Dr Williams the Occupational Health physician believed it was important that the Hearing takes place in order that the Claimant can try to move forward and thus it would be appropriate to hold the hearing in January with the aid of the Claimant's Defence Union to advance a written statement of events.

176. On 10 December 2018 (page 1540), a letter was sent to the Claimant from Dr Rege confirming she had seen the Occupational Health Report and what had been said, as a result the Disciplinary Hearing had therefore been rescheduled for 8 and 9 January 2019 and details of the Panel were set out in the letter; none of which were known personally to the Claimant. The Claimant was reminded that the allegations to be considered were those contained in the original letter dated 3 October 2018, a further copy was attached.

177. The Trust indicated they were prepared to consider modifications to the Disciplinary Hearing process and these were:

    a. If the Claimant chose not to attend the Disciplinary Hearing in person, having regard to Dr Williams views, the Trust will:

        - Permit you to submit a written statement and written representations to be considered at this Preliminary Hearing; and
        - Still permit you to have a Representative attend the Disciplinary Hearing in person on your behalf as set out above.

178. The letter goes on to make it clear that if there are any further modifications that are required to the Disciplinary Hearing process, the Claimant should let Dr Rege know as soon as possible. The Claimant is then asked to confirm within the next seven days if she intends to attend the Disciplinary Hearing in person, or provide a written statement or written representation, or whether she intends to have a Representative attend the Disciplinary Hearing and finally whether there are any specific modifications required to the process.

179. On 14 December 2018, the Claimant responds to Dr Rege, the Claimant questions the process to be followed by the Trust at the Disciplinary Hearing and suggests if the process is to go forward, then it should be on the basis of written participation on both sides.

180. On 21 December 2018 (pages 1545 – 1548), a letter is written by David Pratt the Finance Director, who is to Chair the Disciplinary Hearing, who effectively is responding to the Claimant's letter that either the Disciplinary Hearing should be on the basis of written representations on both sides, or effectively should not proceed until a later date. He records the fact that Dr Williams feels that the Disciplinary Hearing can proceed by putting forward written statements, he takes the view that having regard to all the circumstances, the Disciplinary Hearing should proceed on 8 and 9 January with the modifications to the process as suggested in Dr Rege's letter of 10 December 2018 and he gives his reasoning for that decision. Particularly the modifications proposed by Dr Rege are fair and reasonable in all the circumstances and that will enable the Disciplinary Panel to consider all the relevant facts and all the evidence in order that they can reach a fair, reasonable and appropriate decision.

181. Furthermore, the Claimant's Representative can attend the Disciplinary Hearing in person on the Claimant's behalf.

182. The Claimant does not appear to challenge that decision any further, nor does her Representative as on 31 December 2018 the Claimant submits her written statement for the Disciplinary Hearing and in that statement it does set out a number of reasons why the Claimant thinks the Hearing should not go forward. In summary, responding to the Chair of the Panel, David Pratt, the Claimant writes,

- *"I would very much have liked to attend in person and assist the Disciplinary Panel, but I am not fit to do so and indeed my condition has worsened in recent days due to circumstances outlined above, I would not therefore be attending the Disciplinary Hearing.*
- *Given the circumstances, all I can do regarding my written statement and Representation is to state that I have previously co-operated with the Trust Investigation, answered the questions proposed by the Investigator and provided Dr Rege and the Case Investigator with the information I believe to be relevant to the circumstances. I hope that the Disciplinary Hearing will have regard to me.*
- *I would also not be asking anyone to represent me at the Hearing because they would not be able to discuss matters with me, or obtain my instructions.*
- *With regards to any other modification, I maintain that if the process were to go forward on the basis of written participation from myself, then it would only be fair if this were followed all round."*

183. On 4 January 2018 (pages 1553 – 1555), David Pratt the Chair of the Disciplinary Panel, responds to the Claimant's letter and statement pointing out that Dr Williams believed that it was important that the Disciplinary Hearing took place in January. If this is not the Claimant's view; let him know. He sets out the Disciplinary Hearing Panel will have regard to:

- *"Your witness statement at Appendix 6 to the Investigation Report;*
- *Your statement to Dr Kanchan Rege at Appendix 8 of the Investigation Report; and*
- *Your statement*."

184. He then goes on to say that it may be necessary or appropriate, having considered the evidence from the Trust's Management side and prior to making a decision for, the Panel may adjourn the Disciplinary Hearing to seek clarification from the Claimant on particular matters and invite further representations.

185. He reiterates the fact that the Claimant can still have a representative attend the Disciplinary Hearing.

186. Once again he asks whether there are any further modifications to the process other than those previously suggested.

187. The Disciplinary Hearing proceeded on 8 January 2019. In the Chair was Mr Pratt, Finance Director, with Panel Members Ms Dunnett, Non-Executive Director; Dr C Denman, Medical Director Cambridgeshire and Peterborough NHS Foundation trust; and Mr K Kotecha, Assistant Director of Employee Services (Human Resources). Also in attendance was Mrs C Wilkinson, a witness for the First Respondents who conducted the investigation. Presenting the Respondent's case was Mr M Sutton QC,

188. Mr Pratt had no previous contact with the Claimant. Dr Denman had no previous involvement with the Claimant. Ms S Dunnett appeared to have had no previous contact with the Claimant. Mr Kotecha from HR also had no involvement in the case prior to the Hearing.

189. The Panel prior to the Disciplinary Hearing reviewed the Disciplinary Hearing Bundle which contained Chris Wilkinson's Investigation Report which had been prepared in accordance with the Maintaining High Professional Standards in the Modern NHS Framework which was clearly a comprehensive document (pages 1242 – 1532).

190. The Panel would have been aware from the Investigation Report that the Claimant had accepted, both in her statement provided to Dr Rege on 19 March 2018 (pages 1310 – 1315) and during her interview with Mrs Wilkinson on 19 April 2018 (pages 1293 – 1300) that she had in fact accessed patient data in an unauthorised manner and without a legitimate

reason. It therefore was the Panel's job to determine whether there were any mitigating factors put forward by the Claimant which would excuse her behaviour and if not, whether her actions amounted to misconduct or gross misconduct and then what was the appropriate sanction.

191. It is clear the Disciplinary Hearing commenced around 9:30am. There was some dispute at the outset as to whether the Claimant had received the entire documentation in good time to enable her / her Representative to prepare. The Panel was informed that the MHPS Investigation Report, together with Appendices 1 to 20, had in fact been sent to the Claimant on 3 October 2018 which had been enclosed with a letter from the Trust's Medical Director (pages 1533 – 1535) contrary to the Claimant's suggestion at the outset in her written submissions that she had only received for the first time the documentation on 23 December 2018. There were some further documents in a Supplementary Evidence Pack which were sent to the Claimant on 23 December 2018. The Supplemental Pack contained documentation which showed the records that had been trawled through and it also contained the Trust Policy documents. However, the relevant sections were already referenced in the MHPS Investigation Report. It was determined if there were any further matters that required the Claimant's comments in relation to these documents, then before the Disciplinary Panel reached its decision further questions could be put to the Claimant.

192. As the Claimant was not present and did not send a Representative, it is clear that the Management's case was fully probed and explored. In particular additional questions regarding the culture and relationship within the Obstetrics and Gynaecology Department were considered as these were themes that the Claimant had raised.

193. The Disciplinary Hearing was adjourned after lunch on 8 January 2019, as the Panel required further information from both the Trust Management side and the Claimant before reaching a decision. The Panel then, after a break, spent time preparing additional questions for the Management side and the Claimant which required further clarification.

194. Additional questions were therefore prepared for the Trust's Management side and sent to Mrs Wilkinson in an email of 9 January 2019 (page 1748). The Trust responded to these additional questions on 15 January 2019 (pages 1749 – 1758).

195. On 18 January 2019, Mr Kotecha wrote to the Claimant (pages 1694 – 1698), enclosing copies of:

a. the additional documents which had been provided to the Disciplinary Panel;
b. a record of the Disciplinary Hearing on 8 January 2019;
c.` the Disciplinary Hearing Panel's additional questions to the Claimant (page 1696); and

d. the additional questions to and the responses from the Trust's Management side (pages 1748, 1749 – 1758).

196. It was made clear to the Claimant that the Panel wished the Claimant to have an opportunity to provide further information and the Claimant was asked to provide this further information by 22 February 2019. The Claimant being advised that the Disciplinary Hearing would reconvene on 15 March 2019 and once again the Claimant would be welcome to attend and / or send a Representative.

197. The Claimant's husband responded on 7 February 2019 (pages 1697 – 1698) stating,

> *"…as the Trust has already investigated the matters and my wife provided all the information the Investigation asked her to, there is no reason why she is being asked further questions, particularly when she has become unwell. It is unfair that the Trust is prolonging this process and continuing to ask questions. The process must be concluded on the basis of what you already have obtained so that my wife can put this behind her and commence her recovery."*
>
> *Signed, the Claimant's Husband.*

198. The Disciplinary Hearing reconvened on 15 March 2019 in order to consider the Claimant's response, as well as the additional information received in response to the Panel's additional questions to Management. The reconvened Hearing was attended by the same Panel members and Mr K Kotecha. The Claimant, once again, declining to attend or send a Representative.

199. The Panel concluded that the Claimant's actions in assessing the personal data of the patients was a breach of the relevant highlighted sections of the Trust's Policy, the Storage and Safeguarding of case notes, Good Medical Practice, the GMC Guidance and the Data Protection Act 1998, as well as being unauthorised and inappropriate. That meant the first allegation against the Claimant was upheld. The Panel then went on to consider the Claimant's failure to respond to enquiries from Dr Rege on 19 and 29 December 2017 and 31 January 2018, as to whether that amounted to a failure to follow a reasonable management instruction. The Panel concluded this allegation was well founded.

200. The Panel did not uphold the third allegation (the Claimant's failure to attend the meeting with Dr Rege on 7 February 2018). This was because although the instruction itself was reasonable, it was accepted that the Claimant was entitled to attend the meeting with her Union Representative who was not available on 7 February 2018.

201. The decisions of the Panel were unanimous.

202. The Panel then went on to consider whether the first and second allegations amounted to gross misconduct. The Panel viewed the first allegation as being particularly serious because the rights of patients not to have their confidentiality breached is of paramount importance and this is apparently a core of clinicians' professional obligation. Indeed, the Chair of the Panel Mr Pratt, who had overall responsibility for the Data Protection Compliance and Information Governance, considered the Claimant's breach to be extremely serious. The Panel therefore considered examples of misconduct and gross misconduct in the Trust's Disciplinary Policy (pages 296 – 334 and 314 – 316) and felt that the Claimant's actions fell within the following examples;

- Failure to adhere to Professional Codes of Conduct and Practice;
- Breach of confidentiality, including deliberate misuse of Data Protection information and / or deliberate interference with computerised information; and
- Unauthorised use, processing or disclosure of personal data, confidential data and patient records.

203. The Panel, in considering these examples, concluded that taken together the first and second allegations did amount to gross misconduct. The Panel also concluded that the first allegation considered on its own would have represented gross misconduct. Again, the Panel's decision was unanimous.

204. The Panel then went on to consider the appropriate sanction. They considered the various explanations and mitigation put forward by the Claimant. The Panel considered the culture in the Gynaecological Department, in that the Claimant believed she had been targeted by colleagues and said she had been subjected to ongoing discrimination and that she viewed her actions as Whistle Blowing.

205. The Panel concluded that none of the mitigating factors put forward by the Claimant justified her actions in accessing patient data in the way she did, or failing to co-operate with Dr Rege's enquiries as to how she had obtained it. In relation to the Claimant's assertion that she was engaged in Whistle Blowing, the Panel had serious doubts about this explanation. Clearly the list was not raised in accordance with the Trust's Whistle Blowing Policy which the Claimant should / would have been aware of. The Panel had some doubts that the Claimant had a reasonable belief that the content of the list did reflect Health and Safety concerns given the way it was assembled and that it appeared to have been a means of targeting particular colleagues in order to deflect focus on the Claimant's own clinical practice.

206. The Panel therefore concluded, having considered all the various explanations and the mitigation advanced by the Claimant, the appropriate sanction was summary dismissal, given the fundamental importance of patient confidentiality and the Panel's view that the Claimant's actions went to the core of the relationship of trust and confidence between her

and the Trust. The Panel did consider whether a lesser sanction should be imposed, but concluded in view of the seriousness of the Claimant's actions, no lesser sanction would be appropriate.

207. On 29 March 2019, the Panel Chair Mr Pratt wrote to the Claimant to inform her of the outcome of the Disciplinary Hearing. That letter (pages 1798 – 1802) is comprehensive and sets out the reasoning as to the Panel's decision. The Claimant, in that letter, was informed of her right of appeal.

208. It is to be noted that despite the Claimant asserting she was unable to deal with paperwork and attend the Disciplinary Hearing, she was nevertheless at the time engaging with Acas and at the same time giving instruction in March 2019 for the presentation of her ET1. She was also able in March 2019 to provide a response to Dr Hamilton's Desktop Review of the Claimant's practice.

209. On 1 April 2019, Dr Rege refers the Claimant to the GMC due to her termination of employment and then a further ET1 was presented by the Claimant in April 2019.

210. On 22 April 2019, the Claimant appeals against her dismissal (page 1803), the grounds of the Claimant's appeal are put forward as:

a. the extent to which she had been targeted by colleagues;
b. the Claimant's belief that colleagues had maintained lists of patient complications;
c. the Claimant's belief in the practice of her colleagues caused her to maintain a list of complications;
d. the extent to which the Datix system operated unfairly at the Hospital;
e. the extent to which serious adverse events involving colleagues were not investigated as serious incidents;
f. the fact that although the patient records were accessed without authorisation, the disclosure was to parties that would maintain confidentiality;
g. the fact that the Claimant's belief that the disclosure was in the interests of patient complications being recorded, investigated and to highlight patient safety concerns; and
h. the extent to which the Claimant's decision making was affected by stress as a result of the way she had been treated by her colleagues.

211. In accordance with the Trust's Disciplinary Policy an appeal can be brought on the basis that the penalty was too severe, or there is new evidence which was not previously considered by the original panel, or there were procedural irregularities (page 312). The Appeal was to be conducted by Graham Wilde, the Chief Operating Officer for the First Respondents. It is to be noted he had only recently joined the First

Respondent and knew nothing of any of the individuals involved in matters surrounding the Claimant's Appeal.

212. For reasons best known to the Claimant, although providing a submission to the Appeal she chose not to attend the Appeal Hearing in person. Her submission to the Appeal panel is at pages 1804 – 1805. As it did not contain new evidence, the Appeal was therefore conducted by way of a review of the procedure.

213. On 2 July 2019, Ms Morley from HR wrote to the Claimant to advise that her Appeal Hearing would take place on 16 August 2019 and that Mr Wilde would be Chairing the Appeal. Ms Morley asked the Claimant again to provide any statements or written material which she wished to rely upon, by 22 July 2019.

214. On 29 July 2019, the Claimant confirmed that she would not be attending the Appeal Hearing in person and provided the written submission reiterating her grounds for Appeal as referred to above (pages 1804 – 1805).

215. On 21 August 2019, Ms Morley again wrote to the Claimant as she was unclear as to the Claimant's reasons for not attending the Appeal Hearing in person (apparently the Claimant had not received emails as they had been sent to the incorrect email address). Therefore the Appeal Hearing had been rescheduled for 1 October 2019 in order to give Claimant an opportunity to attend (pages 1811 – 1812). Ms Morley clearly encouraged the Claimant to attend and asked her to confirm by 16 September 2019 whether she would be attending and if so, whether she would be represented.

216. The Claimant responded on 13 September 2019 to Ms Morley, stating that she did not believe Ms Morley needed to know the reasons for the Claimant not wishing to attend the Appeal Hearing (pages 1813 – 1814).

217. It is clear, before the Appeal Hearing Mr Wilde reviewed the Bundle which had been prepared for the Appeal Hearing (that Bundle is at pages 1689 – 1693). In addition, the Claimant had provided for the Appeal Hearing by email of 22 April 2019 (page 1803) and her written submission of 29 July 2019 (pages 1804 – 1805). It was proposed that Mrs Wilkinson and Mr Pratt would make themselves available to attend the Hearing in order to answer the Claimant's allegations.

218. The Appeal Hearing duly took place on 1 October 2019 and lasted for approximately two hours. Mr Wilde was supported by Ms Bainbridge, the Deputy Director of Workforce. The Hearing was also attended by Mr Pratt and Mr Sutton QC who represented the Trust's Management at the Disciplinary Hearing and was again representing the Management Case (the transcript of the Appeal is at pages 1815 – 1826).

219. It is clear from that transcript that Mr Wilde was taken through all the relevant documentation including the transcript of the Disciplinary Hearing (pages 1759 – 1797). Mr Pratt attended in person to respond to the Claimant's serious allegations of sex discrimination, victimisation and detriment due to whistle blowing.

220. Mr Wilde, having reviewed the documentation and hearing from Mr Pratt, was satisfied that both Mrs Wilkinson's Investigation and the Disciplinary Hearing had been conducted in a fair and thorough manner. Mr Wilde was satisfied that the Claimant had not highlighted any particular deficiencies in the process and he saw no evidence to suggest that anyone involved had been influenced by the Claimant's sex, or by the fact that she had previously made complaint of alleged protected disclosures. It was also noted that none of the Disciplinary Hearing Panel had any prior dealings with, or knowledge of the Claimant and therefore had come to their conclusion at the Disciplinary Hearing without any apparent bias.

221. Mr Wilde was also satisfied that the Disciplinary Hearing Panel had given appropriate consideration to mitigating circumstances advanced by the Claimant to the extent that these were raised by the Claimant. It is to be noted that the majority of the Claimant's mitigating circumstances relied upon, were clearly considered by the disciplinary panel and they are expressly referred to in the dismissal letter from Mr Pratt. Mr Wilde also noted that in relation to the Claimant's assertion at the Appeal stage that her decision making had been affected by stress, he concluded that the Claimant had not suggested this was a factor prior to submitting her Appeal on 22 April 2019.

222. Mr Wilde, furthermore, saw no evidence of any procedural irregularity and the Claimant had not advanced any new evidence which had not been available to the Disciplinary Hearing Panel. Mr Wilde, having reflected on the seriousness of the allegation, upheld the decision of the Disciplinary Panel. Furthermore, he did not consider the sanction was unduly severe. The reason for that was had any professional staff, whether members of the Nursing staff, Management staff, Administrator, or Healthcare Assistant, inappropriately accessed patient data in breach of Data Protection requirements in the way the Claimant had, it would have been a dismissible offence. Mr Wilde did not believe that Consultants should be treated any differently, or any more leniently than any other staff groups, such behaviour could not be tolerated and was undoubtedly gross misconduct.

223. Mr Wilde's decision was sent to the Claimant in a detailed letter of 10 October 2019 (pages 1833 – 1839), which clearly sets out his reasoning for upholding the Disciplinary Panel's decision.

224. In the meantime, Dr Rege, on 1 April 2019, refers the Claimant to the GMC using the standard Fitness to Practice Referral form (pages 4 – 10 in the supplemental GMC Bundle). With that she directly enclosed the MHPS Investigation Report prepared by Mrs Wilkinson, including all

Appendices with the exception of the Supplemental Evidence Pack. She also enclosed a letter from Mr Pratt dated 29 March 2019 confirming the outcome of the Disciplinary Hearing.

225. It would appear that the General Medical Council employs a number of Employment Liaison Advisors known as ELA who are responsible for acting as a link between the Trust and the GMC. They are apparently the first point of contact for referrals; it is discussed with those people whether a matter reaches the threshold for referral. Dr Rege discussed the matter with the Trust's ELA, Mr Finn and he agreed that the matter met the threshold for a referral.

226. On 25 April 2019, Dr Rege receives an email from Miss McDermott from the GMC, following the referral and she requested further documentation. In particular:

- Further information about the cluster of complications in 2017 which resulted in the Claimant's practicing privileges being removed, specifically the GMC were requesting information regarding the serious incident on 23 August 2017;
- Further information in relation to the review of the Claimant's practice carried out by Dr Hamilton as well as information about other clinical concerns; and
- Copies of any investigations relating to clinical concerns.

227. It would appear that although the referral to the GMC centred on the Information Governance breach, the GMC were interested in more than the Information Governance breach and were looking at other matters which were referred to in the Investigation Report which did not form part of the Investigation into the disciplinary allegations.

228. Dr Rege was asked to provide the above information by 2 May 2019. Dr Rege did not provide the GMC with any information regarding the Claimant on 25 April 2019.

229. It was on 2 May 2019, Dr Rege sent an email to the GMC setting out her responses to the points set out in the above bullet points (pages 61 – 62 of the GMC Bundle). Dr Rege attached a copy of Dr Hamilton's Desktop Review of the Claimant's practice as well as copies of three SI Investigation Reports which the Claimant had been involved in (pages 63 – 137 of the GMC Bundle). Dr Rege also provided the SI Reports and Dr Hamilton's Desktop Review because they were specifically requested by the GMC.

230. It is clear, when Dr Rege was providing these documents, the GMC had not identified or requested any rebuttal documents from the Claimant and in fact does not recall any other Clinician who has ever made a rebuttal to an SI Report.

231. Furthermore, it did not occur to Dr Rege to provide the GMC with a copy of the Claimant's response to Dr Hamilton's Desktop Review as again, it had not been requested by the GMC to provide it.

232. On 4 March 2020, Dr Rege received an email letter from Ms Shaw of the GMC confirming that they had completed provisional enquiries and that the GMC would now be opening a full investigation to look at the referral in more detail (pages 14 – 17 of the GMC Bundle). In that letter Dr Rege was asked to provide a copy of the hand written operation notes relating to one of the serious incidents in which the Claimant had been involved.

233. On 4 April 2020, Dr Rege emailed Ms Shaw acknowledging the letter of 4 March 2020 confirming that she had searched the Trust's records and could not locate the hand written notes requested. Dr Rege therefore attached the electronic contemporaneous notes instead (pages 41 – 59 of the GMC Bundle).

234. On 31 July 2020, Dr Rege received an email from Mr Sedwell at the GMC, explaining that they had now instructed an independent expert to prepare a report which they expected to receive in the next four weeks. Mr Sedwell also advised Dr Rege that the Claimant had stated that information such as witness statements, her representations following the SI Investigations and her response to Dr Hamilton's Desktop Review had not been provided to the GMC.

235. Mr Sedwell asked Dr Rege to confirm whether any further information was available and if so, to provide copies. Dr Rege replied on 3 August 2020 stating that she did not have a record of the Claimant's response to the Desktop Review, or any further information to share (page 139 of the GMC Bundle). Dr Rege accepts that the Claimant's response to the Desktop Review was sent to her on 15 March 2019. However, Dr Rege was unable to locate such a document in preparing for these proceedings. Furthermore, she has no recollection of receiving the document and accepts it could have been sent in. Ultimately, that was disclosed by the Claimant in any event.

236. It is also the case that all information in a GMC Investigation is disclosed to the Doctor being investigated, in any event. Therefore it would have been completely pointless to withhold relevant material from the GMC as this would come to light during the course of the investigation and the Claimant could provide it in any event.

237. Clearly the Claimant would have an opportunity to provide any additional documents as part of the GMC Investigation process, which could have included any documents that Dr Rege had and did not disclose or could not recall receiving.

238. Finally, it should be noted that the Claimant commenced her employment as a locum Consultant on 3 June 2019.

THE LAW

239. It has been agreed between the parties, particularly Mr Cheetham on behalf of the Claimant, that the Law as set out in the submissions of the First and Second Respondent is agreed and given the length of this Judgment, it would seem unnecessary to repeat. Other than to remind us of the statutory provisions and the burden of proof.

The Equality Act 2010

Direct Discrimination

240. Section 13(1) provides:

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

241. Less favourable is an objective matter of fact, but this does not mean that a Claimant's perception is irrelevant as to whether treatment was in fact less favourable. The difference in treatment alone is not less favourable without more.

242. The scope of the comparison exercise involved under s.13 (which may be with an actual or hypothetical comparator) is explained by s.23(1):

> (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

Victimisation

243. Section 27(1) and (2) provide:

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

The Employment Rights Act 1996

Protected Disclosures

244. In this respect the Tribunal were assisted by the helpful summary of the state of Law of protected disclosures referred to in the submissions on behalf of the Second Respondent and also the First Respondent from Miss Motragi with reference to the Court of Appeal's recent decision in Simpson v Cantor Fitzgerald [2020] EWCA Civ 1601, found at pages 17 – 22 of those submissions.

Automatic Unfair Dismissal – Whistle Blowing

245. Section 103A of the Employment Rights Act 1996 provides:

> An employee who is dismissed shall be regarded for the purposes of this Part 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.

246. Again, the Tribunal were referred to Judgement of Mummary LJ in the case of Kuzel v Roche Products Limited [2008] ICR 799, as set out again at pages 27 – 30.

Ordinary Unfair Dismissal

247. Section 98:

> (1) In determining for the purpose of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) …
> (b) relates to the conduct of the employee;
> (c) …
> (d) …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equality and the substantial merits of the case.

248. In determining the question of whether or not the dismissal was fair, the Tribunal will have to determine the following:

a. What was the reason for dismissal?
b. Did the Respondent carry out reasonable investigation into the Claimant's alleged gross misconduct?
c. Did the Respondent have reasonable grounds for its belief that the Claimant had allegedly committed gross misconduct?
d. Was the dismissal within the band of a reasonable response that was available to the Respondent? and
e. Was the dismissal in all of the circumstances fair?

249. The Tribunal reminding itself it is not the role of the Tribunal to substitute its own view as to what they would have done.

CONCLUSIONS

On the question of limitations –

THE LAW

The Equality Act 2010

250. Whilst the Tribunal accepts it has a wide discretion to allow an extension of time under the just and equitable test in Section 123, it does not follow that the exercise of the discretion is a foregone conclusion. The Court of Appeal made it clear in Robertson v Bexley Community Centre, t/a Leisure Link [2003] IRLR434 CA, that when Tribunals consider exercising the discretion under s.123,

> *"…there is no presumption that they should do so unless they can justify failure to exercise. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule."*

The onus is clearly on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit.

251. There will be two main relevant facts to consider when deciding whether appropriate to exercise discretion to extend time:

(i) the length of, and reasons for the delay; and
(ii) whether the delay has prejudiced the Respondent for example making it difficult to investigate allegations relating to the period of time ago.

Employment Rights Act 1996

252. When a Claimant tries to excuse late presentation of her claims on the ground not reasonably practicable, three general rules apply:

(i) S.111(2)(b) should be given a liberal construction in favour of the employee;
(ii) what is reasonably practicable is a question of fact; and
(iii) the onus of proving that presentation was not reasonably practicable rests on the Claimant. That clearly implies a duty upon the Claimant to show precisely why it was she did not present the claims in time.

253. It is of course clear that the acts and admissions that the Claimant complains of before 3 October 2018 as against the First Respondent, are out of time and therefore the Tribunal have to consider whether they form part of a continuing act or a course of conduct, and if so, whether it would be just and equitable to extend time.

254. Looking at the Claimant's allegations against the First Respondent, all of the allegations are out of time, with the exception of Allegation 18, charging the Claimant with gross misconduct; Allegation 20, the dismissal of the Claimant; and Allegation 21, alleged post dismissal detriment in relation to the communications Dr Rege had with the General Medical Council. It is also true that the Claimant's witness statement which runs to 88 pages, patently fails to address anywhere in that witness statement, the reasons why the claims that the Claimant now makes were not issued before and hence, why they have been issued so late, bearing in mind the claims go back as far as November 2012. That being the first alleged protected disclosure. In fact it is true to say, little has been advanced on behalf of the Claimant as to the reasoning for these claims being brought so far out of time and little is advanced on her behalf in support of the claims being linked or being continuing acts.

255. The Tribunal concluded that what we have in relation to the allegations is a number of discreet acts not connected, which do not form part of a continuing state of affairs and right up until 2017, there appears to be no allegations made against male colleagues of discrimination.

256. Then we have in 2017, the Claimant accessing patient data. This is not a state of affairs. The handling of misconduct allegations were unconnected, the Panel having indeed no knowledge of the Claimant.

257. We then have to consider as a Tribunal, given the fact that the claims are out of time and the fact they are not continuing or connected, whether in the case of the claims under the Equality Act 2010, it would be just and equitable to extend time.

258. The Claimant is highly educated and has had professional links to a medical / legal medical protection society.

259. The Claimant cannot say she was wholly unaware of time limits. The Tribunal repeats, there is not one paragraph in her witness statement where the Claimant sets out the precise reasons, or any reasons, why the claims have not been brought earlier. Indeed, there was nothing in her oral evidence. Quite simply, the Claimant took no steps whatsoever to advance her position. It is also clear that as early as 2015 the Claimant had the benefit of her Defence Union and latterly had instructed Solicitors, including Legal Counsel. The Claimant simply has taken no steps to inform the Tribunal as to the reasons for the delay.

260. There is, in the view of the Tribunal, substantial prejudice to the Respondent given some of the claims go back several years, the inevitable difficulty of investigating and peoples' recollections of events.

261. The Tribunal are therefore satisfied, having regard to the claims under the Equality Act 2010, the Tribunal do not exercise their discretion to allow the late claims in.

Limitations under Employment Rights Act 1996 – re: Whistle Blowing

262. In respect of the first claim against the First Respondent 3310912/2019, the Claimant gives the date that the ET1 claim form was presented was 2 March 2019, the date Acas received Early Conciliation was 2 January 2019 and the date for the Early Conciliation period ending was 2 February 2019, which means that the claims / allegations prior to 3 October 2018 are out of time.

263. In respect of the second claim against the First Respondent 3321381/2019, the Claimant contacted Acas on 29 June 2019, Early Conciliation ended on 16 July 2019. The claim was presented on 16 August 2019. The claims / allegations prior to 30 March 2019 are out of time.

264. It would therefore follow, in respect of the allegations, that unless the Tribunal finds that the in-time allegations are made out as unlawful acts / failures, there cannot be an in-time act / failure which is part of a series of similar acts or failures ending within the primary limitation period of

s.48(3)(a) of the Employment Rights Act 1996 and / or which is part of an act that extends over a period ending within the primary limitation period for the purposes of s.48(4)(a).

265. It must be clear from the Tribunal's findings of fact that the in-time allegations are simply not made out.

266. The next question the Tribunal then has to consider is whether to extend time on the basis that it was not reasonably practicable for the complaint to be presented before the end of the primary three month period. Once again the burden is on the Claimant to satisfy the Tribunal that it was not reasonably practicable and the test imposed is a high hurdle, much greater than the just and equitable principle in discrimination legislation.

267. It does require the Claimant to show that it was simply not feasible for him or her to present a complaint within time.

268. The Tribunal concludes the Claimant has simply failed to discharge the burden that it is not reasonably practicable to have brought those claims in time. The Claimant has simply provided no evidence why it was not possible to have issued claims in time.

269. Therefore, the claims under the Equality Act 2010 against the First Respondent and the claims of Whistle Blowing, making protected disclosures right up until 19 April 2018, are out of time and are therefore all dismissed.

270. In relation to the First Respondent, that leaves us with consideration as to whether the Claimant being charged with gross misconduct was an act of sex discrimination, victimisation and detriment for making a protected disclosure. Further, the Claimant's employment being terminated from the First Respondent, whether that was an act of sex discrimination, victimisation, detriment, making a protected disclosure, or unfair dismissal. Finally, whether Dr Rege providing information to the GMC regarding the Claimant's employment and termination amounted to acts of sex discrimination, victimisation and detriment for making a protected disclosure.

<u>The Claimant being charged with gross misconduct</u> -

271. On 3 October 2018, Dr Rege did write to the Claimant advising her that she would be required to attend a Disciplinary Hearing to consider allegations regarding her conduct. Those allegations were set out in full in that letter (pages 1553 – 1535). That letter made it clear that if the allegations were proven, that could potentially lead to gross misconduct which in turn could result in the Claimant's employment being terminated.

272. The specific allegations which were outlined in the letter were:

> *"a. Whether your actions in accessing the personal data of patients identified in your email of 28 November 2017 represented:*
>
> *(i) a breach of Section 13 of the Trust Policy for Storage and Safeguarding of case notes;*
> *(ii) a breach of GMC guidance;*
> *(iii) a breach of Section 55 of the Data Protection Act 1998; and*
> *(iv) otherwise unauthorised and inappropriate access to patient records.*
>
> *b. Whether your actions in failing to respond to enquiries on 19 and 29 December 2017 and 31 January 2018, by the Trust's Medical Director as to how you obtained the patient data attached to your email of 28 November 2017, amounted to a failure to follow a reasonable Management instruction; and*
>
> *c. Whether failure to attend the meeting with the Trust's Medical Director on 7 February 2018, to discuss how you obtained the patient data attached to your email of 28 November 2018, amounted to a failure to follow a reasonable Management instruction"*.

273. That followed an investigation being carried out by Mrs Wilkinson, the Report dated 14 September 2018 (pages 1242 – 1278) which substantiated charges being laid. The conclusions of that report suggested, together with the Claimant's own statement that had been provided, she had accessed the patient records in an unauthorised and inappropriate manner which suggested also that the Claimant had accessed the records of patients where she was not involved in their care or treatment.

274. The decision to charge the Claimant with gross misconduct, in the circumstances, was an appropriate course of action which the Claimant appeared to accept when cross examined.

275. The Claimant accepting she had accessed data inappropriately and appeared to have breached the Trust's Policy and GMC rules. That is clearly a disciplinary matter and therefore it was appropriate, given the position the Claimant held, that the matter be considered at a Disciplinary Hearing.

276. In those circumstances it is difficult to understand how it can be alleged that Dr Rege's decision was made on the basis of the Claimant's sex or any protected acts or disclosure that the Claimant is said to have made. Indeed, had any male hypothetical comparators acted in a similar manner,

they would clearly have been charged with gross misconduct. That claim is clearly not well founded.

29 March 2018: the Respondent's decision to dismiss the Claimant -

277. This involves a protected disclosure detriment and a dismissal claim and direct discrimination.

278. In dealing with the ordinary unfair dismissal claim, the Tribunal noted that the Disciplinary Panel comprised of three individuals who had, had no previous contact or dealings with the Claimant. They were independent and had no pre-conceived ideas of the Claimant. Indeed, the Claimant, or those advising the Claimant at the time, made no complaint regarding the composition of the Panel.

279. The Disciplinary Hearing was originally postponed on the advice of Occupational Health who then subsequently provided advice that it was in the interests of the Claimant for the disciplinary process to proceed in January. The Claimant was notified of this well in advance.

280. The Claimant and those advising her could have attended the Hearing on 8 January 2019. Notwithstanding the fact that the Claimant did not attend, or was represented, the Claimant had provided written submissions. It is clear from the extensive notes of the Disciplinary Hearing that this was a detailed investigation. Furthermore, the Disciplinary Panel decided further evidence was required and as a result put a series of written questions to the Management and the Claimant (pages 1694 – 1696). Rather surprisingly, given the fact the Claimant was given an opportunity to respond to these questions, the Claimant did not respond to the Panel's questions either in January or any point up until her dismissal at the end of March 2019 when the Panel reconvened.

281. The Tribunal do not accept that the Claimant was too unwell to engage in the Disciplinary Hearing, or the questions put by the Panel. The reasons for this was the Claimant admitted that during January to March 2019, she was involved in on-line learning in respect of an Information Governance course. The Claimant was also at this stage undertaking Early Conciliation with Acas in January 2019 and clearly giving detailed instructions and preparation for her first ET1 in March 2019. At the same time, the Claimant was able to provide a detailed response to Dr Hamilton's Desktop Review, also in March 2019.

282. By the time the Panel reached their conclusion in March 2019, they had before them the Claimant's own statement to Dr Rege that she had made in the previous year in March, where the Claimant acknowledged that she had accessed patient data for non-clinical purposes to satisfy her own curiosity, as well as the Investigating Officer's extensive interview notes with the Claimant in April 2018, signed by the Claimant which involved the same admissions.

283. It is therefore not difficult to conclude that the First Respondents clearly had a genuine belief based on reasonable grounds following a fair and reasonable investigation, that the Claimant had committed the misconduct alleged in relation to the accessing of confidential patient data and further, clearly failed to follow a reasonable Management instruction to respond to requests from Dr Rege on 19 and 29 December 2017 and 31 January 2018 as to how that data had been acquired.

284. The Panel did not accept the Claimant was guilty of the third allegation, failing to follow a reasonable Management instruction in relation to Dr Rege's request to attend the meeting on 7 February 2018.

285. The Disciplinary Panel's decision over the sanctions was clearly reached after considering such mitigation as had been advanced by the Claimant but concluded, quite properly in the Tribunal's mind, that,

> *"None of the explanations put forward justified the actions you had taken in accessing the data of these patients in contravention of your clear professional responsibilities, Trust Policy and the Data Protection Act."*

286. It is therefore clear that the decision to dismiss falls within the band of a reasonable response of a reasonable employer. It is also noted that the Disciplinary Panel did consider whether a sanction short of dismissal should be awarded, but concluded,

> *"Having regard to your position as a Senior Clinician and the fundamental importance of patient confidentiality, your actions struck at the core of the relationship of trust which must exist between employer and employee. In the circumstances, the Panel concluded that no less sanction than summary dismissal would be appropriate."*

287. It is also clear to the Tribunal that at the Appeal stage, the Claimant again, for reasons best known to herself, chose not to attend on 1 October 2019, the date set for the Appeal. She was quite reasonably asked by the First Respondents why she would not be attending the Appeal which had been delayed / postponed to ensure that the First Respondents were understanding that the Claimant did not wish to attend the Appeal, the Claimant simply gave no grounds why she would not be attending.

288. Looking at the minutes of the Appeal and Mr Wilde who considered the Claimant's Appeal, again a man who had little or no contact previously with the Claimant, undertook the process with an open and fair mind in reaching his decision that the Disciplinary Panel's conclusion to dismiss was the correct decision.

Automatic Unfair Dismissal Claim

289. The Tribunal did not have difficulty in concluding that this claim simply, as advanced, makes no sense on the facts. The reason for the Claimant's dismissal had absolutely nothing to do with any protected disclosure the Claimant says she has made. To repeat, the reason for the Claimant's dismissal was the unauthorised access of patient data rather than the disclosing of the patient data. That is clear from the dismissal letter and Mr Wilde who conducted the Appeal. Particularly,

> *"The Disciplinary Panel are also clear that the allegations which it upheld against you relate to the way in which you had accessed patient data (not the disclosure itself) and that any explanation for such access, put on the basis of Whistle Blowing, could not excuse your decision to override established principles of patient confidentiality. The point, therefore, appears to have been considered and adequately dealt with by the Disciplinary Panel."* (page 1839)

290. Therefore, this claim is not well founded.

Direct Discrimination and Victimisation for the Dismissal

291. In relation to the allegation direct discrimination and victimisation for the dismissal, it is simply not the case that any hypothetical comparator, or comparators of Mr Sriemevan, Mr Havenga, Mr Rai or Mr Ramsay, had they accessed patient data for non-clinical purposes in breach of Trust Policy and in breach of GMC Guidelines, would not have found themselves in exactly the same position as the Claimant, face a Disciplinary Panel for potential gross misconduct and the dismissal itself.

292. The reason for the dismissal is quite clear and is completely unconnected with the Claimant's gender.

293. This claim must fail, as indeed must the victimisation claim for sex.

Allegation: Dr Rege provided incomplete information to the GMC regarding the Claimant

294. It is clear that following the Claimant's dismissal Dr Rege made, not surprisingly, a referral to the GMC and in doing so provided a copy of the dismissal letter and the Investigation Report to the GMC. This was done after Dr Rege had liaised with the GMC Employment Liaison Advisor who agreed that given the circumstances of the Claimant's dismissal, that required a referral to the GMC.

295. On 25 April 2019, the GMC requested a copy of the Desktop Review carried out by Dr Hamilton, which Dr Rege duly provided. Dr Rege was

also asked to provide copies of any Investigation Reports relating to any clinical concerns. As a result of this, Dr Rege provided three SI Investigation Reports which had involved the Claimant; two of which were referenced in Dr Hamilton's Desktop Review. These were provided on 2 May 2019.

296. It appears that this allegation relates to some documents that the Claimant says Dr Rege should have provided on 25 April 2019 following the GMC's request for a copy of the Desktop Review. It would appear that the Claimant alleges that the First Respondent, particularly Dr Rege, was discriminating against the Claimant on the grounds of her sex, victimising again on the grounds of sex, subjecting the Claimant to a detriment following alleged Whistle Blowing by not providing the GMC with documents such as the Claimant's response to the SI Report and the Claimant's response to Dr Hamilton's Desktop Review, which in fact the Claimant had in her possession in any event and for reasons best known to the Claimant, did not send them to the GMC. That was after the Claimant became aware that they had not been provided by the First Respondents. That seems to be the upshot of the Claimant's own evidence before this Tribunal.

297. Furthermore, the Claimant appears to be accusing Dr Rege of not redacting parts of the Investigation Report in where Dr Rege had concerns in relation to the Claimant's clinical care and deciding to address these matters informally with the Claimant. Clearly it is not appropriate when providing documents to the GMC, specifically requested, to cherry pick and this cannot under the circumstances be argued as less favourable treatment on the grounds of sex, victimisation, or detriment; if indeed that is what is being advanced.

298. These claims are not well founded.

<u>The Claims against the Second Respondent</u>

299. The Claimant pursues claims of direct discrimination, victimisation and protected disclosure detriment.

300. It is true that the core of the dispute between the Claimant and the Second Respondent is whether on one hand the Claimant was the victim of an unjustified restriction on and ultimately the termination of her practising privileges when such action was without foundation and which she says are acts of discrimination and victimisation and / or unlawful detriment. Or on the other hand, restriction and termination of her privileges were the result of genuine concerns held by the Second Respondent. Concerns initially brought about as a result of the cluster of incidents that the Claimant was involved in and later by the Claimant's failure to meaningfully engage with the Second Respondent about concerns which had arisen in respect of her clinical practice.

301. It is important to note at this stage the Claimant's notification of Early Conciliation to Acas was 17 September 2018. The Early Conciliation period ended on 3 October 2018. This claim was presented to the Tribunal on 3 November 2018. Therefore, if the claim was presented within a month of the end of the Early Conciliation period, the earliest date that falls within the primary limitation period under Section 48(3)(a) of the ERA if extended is 18 June 2018.

302. It therefore follows that only allegations that are within the primary time limit are the allegations in respect of the termination of the Claimant's practising privileges on 18 June 2018.

303. It is therefore correct that unless the Tribunal finds that the in time allegation is made out as an unlawful act, then there cannot be an in time act which extends over a period for the purposes of the Equality Act 2010, s.123(3)(a) and / or a series of single acts for the purposes of the Employment Rights Act 1996.

304. The Tribunal therefore needs to consider here whether the in time allegations is made out. If they are not, then the Tribunal needs to consider whether to extend time under its discretionary powers.

The Decision to Terminate the Claimant's Practising Privileges

305. Quite simply, when Mr Ranaboldo was asked in cross examination to explain in his words why he terminated the Claimant's practising privileges, his answer was quite simply this,

> *"We made collectively, based on the elements that we could not understand. We felt she had ample opportunity to come back to us on the complaints. There was no response on the mesh, no response on probity, no insight into the issues and her behaviours to accessing data. We were sure she had accessed data at the Trust and relatively sure at the Fitz* [Second Respondent]. *Not expected of a Gynaecologist and not reassured. We reached the end of our energy on this. Spent thousands of pounds and time to unravel her and other practise at the Hospital. Tried to be fair to everyone and in this instance not getting the info back."*

306. What led up to this, indeed the Claimant's termination, were:

- The Royal College of Obstetricians and Gynaecologist's Report suggested that there was a potential probity issue in relation to the Claimant's coding of an operation (reference to payment);
- The RCOG's report referring to the Claimant's inserting the vaginal mesh; and
- Mr Ranaboldo informed by the First Respondents there were a number of patients who did not have records at the First

Respondent and might therefore have been patients at the Fitzwilliam Hospital (reference to the accessing of data).

307. After these issues were raised, Mr Ranaboldo set out a series of questions in a letter to the Claimant of 12 April 2018 (pages 641 – 642). That letter included questions relating to key points referred to above.

308. What is surprising is that in the Claimant's witness statement in relation to the probity issue, she can provide a straight forward explanation about the probity coding issue. What is surprising is she could easily have provided this explanation to Mr Ranaboldo in April / May 2018. The Claimant's response was that Mr Ranaboldo had the information in the patient notes and the coding. What the Claimant was saying is he could look it up himself; whereas the Claimant should and could have provided the answer.

309. In relation to the mesh question, again it was put to the Claimant in cross examination that she could have responded to the request for information, simply confirming that she did not routinely do this type of procedure. Whereas Mr Ranaboldo had no information as to whether or not the Claimant was still performing this type of procedure. Again, it makes no sense not to have answered the questions.

310. In so far as patient records were concerned, the records that did not come from the First Respondent logically, therefore they would be patients treated at the Second Respondent, in the absence of an explanation from the Claimant that is where the Claimant must have accessed those records. Mr Ranaboldo's reasoning for that was the First Respondent having passed the NH number and the Second Respondent had records of those patients, so Mr Ranaboldo would have been confident that access occurred at the Second Respondent's.

311. The next question for Mr Ranaboldo was whether the Claimant had a legitimate reason to access the confidential patient records. Mr Ranaboldo was able to conclude that the Claimant did not and the Claimant had not advanced a cogent reason for having a legitimate basis for accessing those patient records.

312. There was in addition to this, failure to provide complete and satisfactory answers to Ms Groom's investigation into two patient complaints.

313. Therefore at the time Mr Ranaboldo terminated the Claimant's privileges, he had waited nearly two months for straight forward answers to simple questions (page R2, 731). Therefore, the reason to terminate was clear concerns in relation to the Claimant's clinical practice and probity which had absolutely nothing to do with the Claimant's gender or suffering a detriment as a result of making any alleged protected disclosures, nor was she being victimised on the grounds of sex. Those characteristics were completely unconnected with the reasons for the Claimant's termination.

314. Therefore, as night follows day, clearly events preceding 18 June 2018 are not connected or a series of similar acts and the question again arises whether it would be just and equitable to extend time in relation to the claims under the Equality Act 2010 and whether in relation to the detriment claim whether it was not reasonable or practicable for the claim to be presented before the end of the three month period and if not, why not?

315. To repeat, the burden is on the Claimant to establish that time should be extended. It is therefore for the Claimant to show and advance evidence of a good reason and for reasons already canvassed in relation to the First Respondent, the Claimant has patently failed to do so. Therefore, there is no reason to exercise the discretion in relation to the Equality Act 2010 and clearly was reasonably practical in relation to the claim under the Employment Rights Act 1996 to have been issued within the three month period. Therefore the Tribunal has no jurisdiction in respect of those claims.

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Employment Judge Postle

Date: 2 June 2021

Sent to the parties on: 15 June 2021

S. Bhudia

For the Tribunal Office