EMPLOYMENT TRIBUNALS

Claimant: Mrs B McInerney

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard at: Nottingham **On:** 7-11 and 14-18 September 2020, 19 and 20 November 2020, 18 March 2021

Before: Employment Judge M Butler
Members: Mrs K Srivastava
Mr J Purkis

Representation
Claimant: Ms E Grace, Counsel
Respondent: Mr J Boyd, Counsel

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of constructive unfair dismissal and victimisation are well founded and succeed. The Claimant is entitled to compensation.

2. This case will now be listed for a remedy hearing.

REASONS

The Claims

1. The Claimant submitted her first claim form to the Tribunal on 25 June 2019 after a period of Early Conciliation bringing claims of constructive unfair dismissal and race, age and sex discrimination. She subsequently withdrew the discrimination claims on 6 December 2019. She submitted a further claim of victimisation on 31 January 2020 after a period of Early Conciliation.

2. The Claimant was employed by the Respondent as a Consultant Forensic Psychiatrist at Rampton Hospital from 2003 until her retirement on 1

February 2019. The factual background to these claims is considered in detail below but is summarised briefly here. The claim of constructive unfair dismissal arises out of what the Claimant alleges are a number of acts, omissions and decisions by the Respondent's managers and clinicians, including the various investigations after the death of a patient in her care. She claims these matters constitute fundamental breaches of the implied term of trust and confidence culminating in her enforced retirement. Her victimisation claim is based on the Respondent's refusal to consider her application to work on a part-time basis as Forensic Psychiatrist in the Respondent's Forensic Gender Clinic and, specifically, refusing to allow her to apply for the role, not acknowledging or considering her subsequent application and not offering her the role. This was a role the Claimant had carried out one day each month for the Respondent whilst employed at Rampton. The protected act relied on by the Claimant is the submission of her first claim. The Respondent denies all claims.

The Issues

3. The parties helpfully agreed a List of Issues which are as follows:

Constructive unfair dismissal

3.1 It is accepted that there is an implied term in the Claimant's contract of employment that the Respondent shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and Respondent.

3.2 Between 7 January 2017 and 1 February 2019, did the Respondent, by the actions of Dr Silva, Mr Wright, Dr Packham and/or Dr Hankin in relation to the Claimant as set out below, breach the implied term of trust and confidence, either individually or collectively, or did the Respondent act with reasonable and proper cause at all material times?

(a) On or around 7 January 2017, the manner in which the Serious Untoward Incident inquiry (SUI) was investigated, specifically, failing to take into account the Claimant's, and other members of staff's, concerns and viewpoint;

(b) Not one of the Claimant's factual corrections being made to the final version of the SUI report which was sent to the Coroner on 21 March 2017 and circulated within the Trust on 15 August 2017; (n.b. the Claimant clarified at the hearing that it was Mr Wright's statement that was circulated and not the SUI report);

(c) On 21 March 2017, Mr Wright providing a statement to the Coroner effectively endorsing the unchanged SUI report;

(d) The Trust not initially providing the Coroner with documents relevant to the Inquest and only doing so once pressed to do so;

(e) Continuing with the Maintaining High Professional Standards investigation (MHPS), and subsequently amending the terms of reference, in the light of the Coroner's findings;

(f) The MHPS investigating officer not being provided with the Claimant's list of factual inaccuracies to the SUI report, not being informed that the contents of the SUI report were disputed and not being provided with any evidence or related documents from the Inquest or the Coroner's findings;

(g) Mr Wright circulating the SUI report within the Trust on 15 August 2017 but without including the Claimant's corrections and accompanying it with ambiguous wording regarding the Claimant's evidence and the Coroner's findings at the Inquest;

(h) Mr Wright circulating his statement from the Inquest to the Trust's Medical Staff Committee on 15 August 2017 which contained numerous factual inaccuracies which he was aware of at the time of circulation but did not amend or qualify;

(i) Following the conclusion of the MHPS investigation, and without the Claimant knowing the outcome of the investigation, Dr Packham telling the Claimant on 5 April 2018 that she had three choices - to resign, retire or face a conduct hearing arranged and overseen by Mr Wright;

(j) On 6 July 2018, Mr Wright circulating a document to the Claimant's consultant colleagues informing them that the Claimant was to be subject to a conduct hearing.

3.3 If there was a breach of the implied term of trust and confidence on the basis of the above, was it sufficiently serious to have justified the Claimant's resignation? Alternatively, was it the last in a series of acts which justify the Claimant's resignation?

3.4 Did the Claimant wave or affirm any of the alleged breaches of the implied term of trust and confidence?

3.5 Did the Claimant resign in response to the alleged breaches of the implied term of trust and confidence?

3.6 Insofar as the Tribunal finds that there has been a dismissal, was this an unfair dismissal?

Victimisation

3.7 Did the Respondent subject the Claimant to a detriment by not allowing the Claimant to apply for the role of Forensic Psychiatrist in the Forensic Gender Clinic in September 2019?

3.8 Did the Respondent subject the Claimant to a detriment by not considering and/or acknowledging and/or responding to the Claimant's application for the role of Forensic Psychiatrist in the Forensic Gender Clinic in October 2019?

3.9 Did the Respondent subject the Claimant to a detriment by not offering the Claimant the role of Forensic Psychiatrist in the Forensic Gender Clinic in October 2019?

3.10 If so, was this because the Claimant did a protected act by issuing a claim in the employment Tribunal against the Respondent in June 2019?

Remedy

3.11 If successful, what compensation should the employment Tribunal award to the Claimant?

3.12 Insofar as the Tribunal finds that there has been an unfair dismissal, should any compensation awarded to the Claimant be reduced to:

(i) reflect the Claimant's contributory conduct and/or

(ii) pursuant to Polkey v AE Dayton Services Ltd [1987]ICR 142, to reflect the fact that the Claimant would have been dismissed in any event following the disciplinary process.

3.13 What compensation, if any, should be awarded for injury to feelings?

The Law

4. The relevant provisions of the Employment Rights Act 1996 (ERA) are:

S.95 **Circumstances in which an employee is dismissed.**

(1) For the purposes of this Part an employee is dismissed by his employer if

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

S.98 **General.**

(1) In determining for the purposes 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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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 equity and the substantial merits of the case.

5. S.27 of the Equality Act 2010 ("EqA") provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

6. We were referred to the following case law:

Malik v Bank of Credit and Commerce International SA [1998] AC 20
Western Excavating (ECC) Ltd v Sharp [1977] EWCA Civ 2
Omilaju v Waltham Forest LBC (No.2) [2004] EWCA Civ 1493
Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978
Moores v Bude-Stratton Town Council [2000] IRLR 676
Martin v Glynwed Distribution Ltd [1983] ICR 551
Sandhu v Jan de Rijk Transport Ltd [2007] ICR 1137
Stephenson & Co (Oxford) Ltd v Austin [1990] ICR 609 (EAT)
Nagarajan v London Regional Transport [1999] IRLR 572

Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065

Igen Ltd v Wong [2005] ICR 931

Ayodele v Citylink and anor [2017] EWCA Civ 1913

Hewage v Grampian Health Board [2012] ICR 1054

Commissioner of Police of the Metropolis v Shaw [UKEAT 01215/11/ZT

Broome v Cassell & Co Ltd [1972] AC 1027

Rookes v Barnard [1964] AC 1129

Zaiwalla & Co v Walia UKEAT/451/00

Bungay and anor v Saini UKEAT/0331/10

Chindove v William Morrisons Supermarket PLC UKEAT/0201/13/BA

Chandhok and anor v Tirkey (Race Discrimination) [2014] UKEAT 0190/14/1912

Baldwin v Brighton and Hove City Council [2007] ICR 680

Wright v North Ayrshire Council [2013] UKEAT 0017/13/2706

Morrow v Safeway Stores Ltd [2002] IRLR 9 EAT

Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121

British Aircraft Corporation v Austin [1978] IRLR 332

Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316

W E Cox Toner (International) Ltd v Crook [1981] IRLR 443

Colomar Mari v Reuters Ltd [2015] UKEAT/0539/13/MC

G W Stephens & Son v Fish [1989] ICR 324

Fereday v South Staffordshire NHS Primary Care Trust [2011] UKEAT/0513/10/ZT

Hadji v St Luke's Plymouth [2013] UKEAT/0095/12/BA

Brown and ors v Neon Management Services Ltd and anor [2019] IRLR 30

Amnesty International v Ahmed [2009] ICR 1450

The Evidence

7. There was an agreed bundle of documents comprising 736 pages. References to page numbers in this judgment are to page numbers in the bundle.

8. We heard oral evidence from the Claimant and her husband, Dr C Clark, who also worked at Rampton at the material time. For the Respondent, we heard evidence from Dr C Packham, Associate Medical Director, Dr F Mason, Honorary Consultant engaged by the Respondent from time to time and who chaired the MHPS investigation, Mr P Wright, who was Executive Director for Forensic Services at the Respondent from October 2016 to 31

March 2020, Dr S Murjan, Consultant General Adult Psychiatrist and Gender Specialist at the Respondent and Dr J Hankin, Executive Medical Director.

9. All of the witnesses produced witness statements and were cross-examined.

10. We were grateful to Ms Grace and Mr Boyd for their helpfulness throughout this hearing. Their knowledge of the documentary evidence before us was thorough and detailed and assisted us greatly.

The factual background

11. In order to make our findings of fact, the Tribunal first briefly considers the factual background from the parties' perspective and will then examine the evidence of the individual witnesses. This background is a brief narrative only which will provide a basis for the detailed examination of the evidence and our findings of fact.

12. The Claimant was appointed to the role of Consultant Forensic Psychiatrist in the high secure women's service within Rampton Hospital on 15 December 2003. One of the patients in her care, who will be referred to as CW, committed suicide on 5 February 2016. CW had a very complex history of psychiatric problems and was only 25 years old when she died. At the time of her death, she was subject to 15 minute observations and it transpired that, although the observations were noted as having been completed around the time of her death, the nurse responsible for these had not, in fact, carried all of them out.

13. Following normal practice when a psychiatric inpatient unexpectedly dies, a Serious Untoward Incident Inquiry ("SUI") had to be commissioned. This was actioned by Dr Clark who was at the time the Respondent's Associate Medical Director for Forensic Services. As he is also the Claimant's husband, Dr Clark recused himself from overseeing the SUI and passed this to Mr Wright, Executive Director of the Forensic Division. Dr Edward Silva, a Consultant Forensic Psychiatrist from another hospital, was appointed to carry out the investigation.

14. The Claimant freely admits that her record keeping left something to be desired. It is her case that, although she saw CW on a regular basis, the notes she took were not kept up-to-date on the Respondent's computer system which is known as RiO. The Claimant says that she reviewed CW at least weekly and kept paper based reviews of segregation, seclusion and the use of mechanical restraint and there were also in existence written care plans and risk assessments.

15. During the investigation by Dr Silva, he was critical of what he perceived to be the Claimant's lack of cooperation and concerns were raised about the manner in which the investigation was conducted, particularly by those required to give statements. The Claimant also says that she was criticised for not producing the paper records of her care of CW but she had

no access to them after CW's death. This is because, for obvious ethical reasons, an attending physician cannot have access to the medical records of a patient who has died while under their care. Mr Wright says he instigated a search for the missing documents but they could not be found. Dr Silva's report was critical of the Claimant's care of CW and said there was a lack of effective treatment for schizophrenia. The Claimant confirms that she had not treated CW for schizophrenia since, along with others who had been responsible for CW's care previously, she had concluded that CW was not schizophrenic.

16. Dr Silva's report dated 20 January 2017 was critical of the Respondent's failure to learn lessons following the death of another patient in August 2015 in that, inter alia, the Claimant had withdrawn treatment for schizophrenia and there had been a failure to adequately perform observations and keep relevant records.

17. On 8 November 2016, Dr Packham wrote to the Claimant to advise her that, following CW's death, there would be a Maintaining High Professional Standards investigation ("MHPS") into her care of CW. Dr Mason was appointed to carry out the investigation and report her findings. During the course of the investigation, the Claimant advised Dr Mason of the existence of the documents recording her care of CW and Dr Mason asked Mr Wright if he could forward these documents to her. It is accepted that Mr Wright did not forward those documents and that Dr Mason did not follow-up her request and completed her report without these documents. The report criticised the Claimant for a poor standard of documented care given to CW in the six months preceding her death and failing to upload documents on to the RiO system (page 453). The Claimant was absent from work with stress and anxiety between 11 November 2016 and 9 May 2017.

18. There was also a Coroner's Inquest into the death of CW and the Record of Inquest is at page 408. The Claimant gave evidence to the Inquest for some two days. During the course of that evidence she mentioned the existence of her paper records in relation to CW's care and the Coroner ordered the Respondent to find those documents. Within a short period, the documents were found by the Respondent and produced to the Coroner who expressed satisfaction with the standard of care given to CW by the Claimant.

19. Mr Wright had given a statement to the Inquest. He circulated this statement to the Rampton Medical Staff Committee in 2017. The Claimant's assertion is that the statement was wrongly critical of her, especially in light of the Coroner's conclusion that there was no issue with the standard of care given to CW. Mr Wright was aware of this comment by the Coroner but made no mention of it when circulating his statement.

20. In February 2018, Dr Packham contacted the National Clinical Assessment Service (NCAS) for advice in relation to the Claimant's conduct in respect of the MHPS report. The advice given was to form a Decision Making Group ("DMG") to consider the matter. This group would consider whether the Claimant's conduct should be considered at a conduct hearing.

21. After being invited by Dr Packham to an informal meeting to consider the MHPS report, the Claimant met with him, accompanied by her husband, on 5 April 2018. Dr Packham set out three alternatives for the Claimant to consider. These were resignation, retirement or face a conduct hearing. On 6 July 2018, Mr Wright circulated a document to other consultants at Rampton stating that the Claimant was to be the subject of a conduct hearing.

22. The Claimant ultimately elected to take early retirement and, after receiving relevant information about her pension, including what was due under her Northern Ireland pension, she served six months' notice of her retirement on 1 August 2018.

23. The Claimant raised a grievance on 4 October 2018 raising issues largely concerning Mr Wright's involvement in her treatment following CW's death. This was considered by Ms J Attfield, Interim Chief Executive, who on 10 January 2019 upheld the allegation that Mr Wright had breached the Claimant's confidentiality and that there had been flaws in the MHPS process. Other matters were not upheld. The Claimant appealed but the appeal was not progressed by the Respondent due to her retirement.

24. Dr Hankin referred the Claimant to the General Medical Council ("GMC") on 14 December 2018. She did not advise the Claimant she was doing this. The Claimant found out about the referral to the GMC about a month later when the GMC wrote to her enclosing a copy of Dr Hankin's letter. No action was taken by the GMC.

25. From around 2007, the Claimant was involved in the development of the Respondent's Forensic Transgender Service. This led to the setting up of a Forensic Gender Clinic. This was the only forensic gender service nationally and the Claimant's stated intention was to continue with her work after retirement from her substantive post which she had originally anticipated would be in February 2020. The post was advertised internally at the Respondent in September 2019. Dr Hankin said she would consider the Claimant's application for the role under the Respondent's "retire and return" policy. The Claimant duly applied, received no acknowledgement of her application and issued a claim for victimisation. After issuing her claim, the Claimant received a letter from Dr Hankin confirming she could not consider the Claimant's application because, having already retired, she could not be considered under the retire and return policy. This policy allows clinical staff to reach an agreement with the Respondent that they may retire and then be re-employed by it.

The Claimant's Evidence

26. Giving oral evidence before the Tribunal was clearly an emotional experience for the Claimant. On numerous occasions she answered questions spontaneously but then proceeded to wander away from the subject matter of the question in a manner which indicated to the Tribunal she was both nervous and eager to have her case and its attendant allegations

considered. On a few occasions she became visibly upset. Having said that, there was nothing in the Claimant's evidence, or the way in which she gave it, which gave the Tribunal cause for concern either in relation to her recollection of events or the manner in which she gave her evidence.

27. From the start, the Claimant accepted and confirmed that her record keeping was not good enough. She agreed it was very important to keep records so other clinicians could refer to them. It was, she said, a fundamental principle. The events of 2016 had led to her undertaking training on her own initiative to improve her record keeping. Her evidence was that she spent time with her patients rather than documenting matters. She said a physical handover of patients must take place from day to night staff and it was not, however, usual for contemporaneous notes to always be available. The RiO system was not the only way to keep records and she did not consider it was fully functional on the wards.

28. The Claimant said that CW had had six responsible clinicians whilst at Rampton and the Claimant had been the responsible clinician on several occasions. In relation to Dr Silva's diagnosis of schizophrenia, she said he was wrong and pointed out that he had never seen CW whereas the Claimant saw her over a long period of time. She had not discontinued treatment for schizophrenia as CW was not schizophrenic.

29. The Claimant was taken to Page 116 which were the comments on the draft SUI report after Dr J Wallace, Clinical Director, had asked for feedback from those who were interviewed by Dr Silva. The Claimant explained her understanding that the investigating team recorded some witness statements, produced a summary statement and then were not inclined to take account of the interviewees' comments by amending their statements. In the case of the Claimant, when she was interviewed the recording device was switched on and off on a number of occasions. She raised issues with the statements generally but Dr. Silva refused to change them. She made 19 suggested changes to her own statement and none were accepted. When her statement was sent to her for comment she found it to be a mixture of assertions and opinions. She reported this to Dr Wallace but did not know whether he passed this on. She was under the impression that her list of factual inaccuracies was disregarded. Commenting on the note in the SUI report at page 343 that the Claimant failed to reply for two months following "multiple requests" for her comments on the minutes of her interview resulting in a verbatim transcript being prepared, the Claimant said that the transcript could not have been verbatim because the recording device was turned off and back on again on a number of occasions thereby not capturing all that was said. The Claimant had also been on sickness absence.

30. The Claimant explained that the single healthcare record for each patient was held on the ward. It contained some electronic notes, legal information, observation sheets which were filled in by hand and segregation records. Risk assessments were held electronically. Separate notes were made in respect of ward rounds and attendances on patients and she would

give these to her secretary to input into RiO. Her secretary had a large backlog of such work.

31. At page 126, the Claimant makes comments on the draft SUI report. She expressed concern that the investigating team had access to limited material and she had advised the team of the existence of paper notes in CW's Single Healthcare Record. She noted that these documents were not taken into account and, although she indicated where they might be found, she herself was unable to access or look for them for the ethical reasons already mentioned after CW's death.

32. As evidenced at page 139, the Claimant sent her list of factual inaccuracies in the draft report to Dr Wallace and Mr Wright. She had previously noted Dr Silva's criticism of her in his email to Dr Hankin but explained that he was asking for documents that did not exist or it was not within her gift to either look for or produce. When questioned about the missing documents by Mr Boyd, the Claimant freely acknowledged that the documents had travelled a tortuous route before being discovered. Further, the reference to her record keeping, namely, that it could be improved, was acknowledged by her. She was of the view that her list of factual inaccuracies was not mentioned in the SUI report and possibly not seen by Dr Silva.

33. The Claimant said her real issue with the Respondent was the failure to produce the missing documents that she and her solicitors asked for on several occasions between them. They were only produced after the Coroner ordered the Respondent to search for them. She is clear that her reputation would not have been ruined had the documents been produced earlier. She also explained her issue with Mr Wright circulating his statement to the Inquest when it contained inaccuracies such as stating the Claimant was only recorded as having seen CW three times in the five months before her death (page 396) when the missing documents had by this time been found and established this was not true.

34. The Claimant also acknowledged that she would have had no real issue with the MHPS investigation continuing with Dr Mason had all of the documents and the Inquest notes been made available which they were not. In particular, the Inquest notes taken by Jane Rollinson, Mental Health Act and Referrals Manager of the Respondent, record the Coroner's acceptance of the Claimant's regular attendance on CW before her death. The Claimant accepted that she thought Dr Mason had acted in a fair manner given that she did not have all of the information she should have had (page 558 refers).

35. The Claimant did not seek to avoid the issue about record keeping nor to attach the blame for RiO not being updated by her secretary. These were matters which, in the Tribunal's view, having heard Dr Mason's evidence, could have been used as an excuse in that the Claimant did not say she did what other clinicians at Rampton did or did not do in relation to record keeping.

36. We also noted that the Claimant was confused about the Forensic Gender Clinic role and why she was not appointed. She at no time tried to criticise the evidence of Dr Murjan and readily accepted her comments on the basis that she had no reason to doubt them.

37. Further, at no time did the Claimant seek to rely on her workload as an excuse for poor record keeping despite the fact that it was at times almost double what was considered reasonable.

38. We considered all of the Claimant's evidence to be honestly given.

Evidence of Dr C Clark

39. Dr Clark's evidence was given in a very even-handed and straightforward manner. As the Claimant's husband, it would be expected that he would be supportive of his wife, and he was. He did voice opinions on certain matters, which we noted, but they did not influence our deliberations. However, Dr Clark attended the meeting with Dr Packham on 5 April 2018 supporting the Claimant and he produced notes of that meeting, which are at page 498. This is the only record of the meeting other than the "speaking note" prepared by Mr Wright for Dr Packham and associated emails (pages 486 – 497).

40. Dr Clark's evidence was that he took notes during the meeting with Dr Packham and typed them up immediately afterwards. He confirmed that both he and the Claimant expected a discussion on record keeping and he was astonished at its actual content. He was clear that Dr Packham said there was sufficient in the conclusion of Dr Mason's report for the Claimant to face a disciplinary panel on conduct grounds. He also confirmed his notes that Dr Packham said there were "a shed load of other things wrong with the way the medical staff are run at Rampton". Dr Clark said that Dr Packham said the meeting was an opportunity for the Claimant to consider other options, which were either resignation or retirement. Further, Dr Packham had said he had not taken the decision to involve the General Medical Council as there was "no issue about competency". The Claimant was then given ten working days to make a decision.

41. Dr Clark did not agree that Dr Packham came across as being reasonable in the meeting. He was, however, critical of the lack of forewarning about the content of the meeting. He was left in no doubt that the Claimant would be subject to a conduct hearing unless she took one of the other options.

Evidence of Dr C Packham

42. Dr Packham worked at Rampton Hospital as a General Practitioner. In relation to the issues in this case, his evidence was relevant in relation to two matters in particular. The first is references to systemic issues with record keeping at Rampton and the second is the meeting with the Claimant and her husband on 5 April 2018.

43. In relation to systemic issues, Dr Packham confirmed he had been copied in to Dr Mason's email to Dr Hankin of 6 March 2017 (page 376A and B). He acknowledged that Dr Mason was indicating in this email that national standards of record keeping, known as the Care Programme Approach, did not seem to be used at Rampton. He said he had interpreted this as concerns generally but which were related to the Claimant and which posed the question whether there were systemic issues or there was a capability or conduct issue in relation to the Claimant. Given the context of the email which, at the very least, if it did not refer to practices at Rampton generally, did refer to the six responsible clinicians who had from time to time been responsible for CW's care, we considered his focus only on the Claimant in respect of record keeping and other matters to be somewhat surprising.

44. Dr Packham said that, notwithstanding the letter from the Claimant's solicitors (pages 384(a) and (b) and the conclusions of the Coroner that there were no issues with the Claimant's care of CW, he still felt it appropriate to continue with the MHPS. In this regard, at page 417, in an email dated 10 October 2017 from Dr Mason to Dr Packham, Dr Mason asks for a copy of the factual inaccuracies submitted in connection with the SUI by the Claimant. Quite remarkably, given the seriousness of the alleged issues surrounding the Claimant's care of CW, Dr Packham's evidence was,

> "In reply, I didn't send her anything. The standard of care is not just about death but also routine care. The terms of reference allowed Dr Mason to decide whether the practices the Claimant followed were unique to her or systemic in the organisation".

Dr Packham continued by saying,

> "Dr Mason asked for these documents. I didn't give them. I thought she would ask again if she really needed them. She didn't ask again. I admit I should have at least asked if she still needed them".

45. It is fair to say that the Tribunal was unimpressed with this evidence. Later in his cross-examination, Dr Packham said,

> "I should have made sure Dr Mason had the factual inaccuracies report but I expected her to complete her own independent investigation. I accept I failed to check if she had received that information."

This was inconsistent with his subsequent comment that,

> "My role was to manage the process and assist the investigation in any way I could."

46. Dr Packham was also involved in deciding whether the Claimant should be subject to a disciplinary process because of her conduct. He was referred to page 483 which is a letter dated 26 February 2018 from Mr J Randall of NCAS. Mr Randall had previously spoken to Dr Packham as noted

in Dr Packham's email to Dr Hankin on page 482 and Dr Hankin's subsequent email to Mr Wright saying that the advice was "in line with where you wanted to take it anyway". The interesting point about this aspect of Dr Packham's evidence is that he refers to forming a DMG which he says met, as was required in the Respondent's policies, and he said a representative from Human Resources was heavily involved in the meeting. No minutes of any meeting of the DMG have been produced.

47. In relation to the without prejudice meeting on 5 April 2018, at the time of this meeting, Dr Packham said the DMG had not yet been formed and had not met. He said information had been shared with all Executive Directors and there had been informal discussions. He accepted this was outside the Trust's policy and confirmed there were no notes of any of these alleged discussions. He said the purpose of the meeting with the Claimant and her husband was not to instruct her to resign by making her think she had no alternative but to resign or be dismissed. Dr Packham's evidence in relation to this meeting was unconvincing. His first confusing comment was, "HR must have instructed me how to conduct the meeting". He said he had a meeting with HR before the meeting with the Claimant for advice. The meeting was, he said, to offer alternative options to the decision that had already been taken which was to proceed to a conduct hearing. He accepted that the Claimant did not know at the time that there would be a conduct panel and said the Claimant could have said she wanted to go forward to the conduct panel. He considered Dr Clark's notes to be "broadly accurate". He was trying to get it across in the meeting that the meeting itself was outside the Respondent's policy so there was some legitimacy in what he was saying. The meeting itself had been agreed by Mr Wright and the Respondent's solicitor. He insisted he was not instructing the Claimant to resign rather than proceed to a conduct hearing. He was acting on advice, including legal advice. He said that with the benefit of hindsight he should have sent the draft letter at page 494 to the Claimant in order to explain to her what the meeting was about.

48. Referring to page 500, Dr Packham agreed that this email of 11 April 2018, was written just six days after his meeting with the Claimant, and said that although he had initially suggested ten working days in which she should make her decision as to resignation, retirement or facing a conduct panel, he noted he had not heard from her. He then said,

> "So we would need to hear from you by 26th April. After this date we will have to follow the policy and initiate the formal panel hearing as we discussed unless we hear from you."

The Tribunal agree that this email put pressure on the Claimant, as did his letter of 18 June 2018 (page 504) in which he said he was not able to allow this stage of the policy process to stall any further and, if it was her intention to retire, he would need this in writing by 29 June 2018. He concluded that letter by saying,

> "Unfortunately if we have not received (your decision) by this date then we have no option other than to follow the conduct policy and initiate the formal panel hearing as we discussed at our meeting on 6 April."

The Tribunal was unanimously of the view that this correspondence amounted to a threat to the Claimant that, if she did not resign or retire, she would face a conduct hearing.

49. Dr Packham did seem to understand that the Claimant had to obtain details of her pension from the time she worked in Northern Ireland before being able to make a decision on retirement as her chosen course of action. In his evidence he ultimately said he understood that the Claimant resigned as soon as her financial picture was known.

50. In response to a question from the Employment Judge, Dr Packham said, "we" had already made the judgement that it should not be referred to the General Medical Council but was serious enough for a conduct hearing. He went on to say that it was the first time after a MHPS report he had been asked to offer the options given to the Claimant. It was not a common practice. He clarified what he meant by using the word "we" and said this referred to the DMG. The tribunal noted again that there are no minutes of any meeting of the DMG produced in this hearing. Dr Packham then said that he assumed the decision to have an informal meeting was taken by Mr Wright after having HR and legal advice. He confirmed the Claimant was not given the speaking note drafted by Mr Wright.

51. Our overall impression of Dr Packham's evidence was that it was unreliable. He seemed to have a poor grasp of the Respondent's policies and could not produce documentary evidence to support his oral evidence. We considered that the meeting with the Claimant on 5 April 2018 was ill-considered in that he gave her no indication of what the meeting was about and surprised her with its contents which amounted to a veiled threat that she should resign or retire or face disciplinary action. His subsequent correspondence chasing her for a decision only served to reinforce the tribunal's view of his intent.

Evidence of Dr F Mason

52. Dr Mason began her oral evidence in a very confident manner but our impression was that that confidence became less relaxed as her evidence moved on. She is an independent practitioner and an Honorary Consultant with the Respondent. She confirmed she had only carried out this investigation for an NHS trust although had carried out other investigations for some medical organisations where she was the case, or joint case, investigator but this was some years previously.

53. She said that she largely dealt with Dr Packham in relation to the MHPS. Somewhat surprisingly, she admitted that she did not recall reading the Respondent's MHPS policy (page 700). In fact, she said she only saw it when she read the hearing bundle. When referred to page 704 at paragraph

5.3.6 of the policy which requires "The Trust Chair must designate a non-executive member "the designated member" to oversee the case and ensure that momentum is maintained", Dr Mason said she did not know who the designated member was or even if one was appointed. Further, at page 705, referring to the fourth bullet point of paragraph 5.5.1, Dr Mason confirmed she did not agree a course of action with the "designated HR lead" and she did not know who that was. In relation to paragraph 5.5.5 on page 705 and, specifically the requirement to make a decision as to whether there is a case of misconduct that should be put to a conduct panel, she said it was not her understanding that she was to refer to conduct. She was highlighting the facts as she found them and it was not within her remit to comment on the next steps. Her role was about the provision of information to allow the case manager to make a decision.

54. Dr Mason said she understood she would be given all the documents she needed but might have to specifically ask for others. She was able to look at records on the RiO system provided she was given access.

55. She was aware from the letter at page 107, which she had a copy of, that there were concerns raised by Dr Clark about the way in which the SUI had been conducted and the nature of the interviews.

56. Dr Mason was referred to page 376a. She explained that, in relation to CW, there were general systemic issues regarding infrequent mental state examinations, lack of risk assessments, incomplete capacity assessments, failure to obtain consent for treatment, a failure to undertake or document reviews of seclusions/segregation, failure to undertake or document reviews of mechanical restraint and failure to undertake or document reviews of observations. There was also an issue in relation to frequency of medical contact. It was clear from Dr Mason's report that these systemic issues were not confined to the Claimant but were clearly relevant to all of the responsible clinicians who treated CW. Dr Mason said she was also aware that the RiO system was not a total record as there were also paper records. She said she was told that some people did not use the electronic diaries but did not delve further into the details of this.

57. She confirmed that, at the commencement of the MHPS, she did not know the detail of the Inquest but became aware that the Claimant's standard of care was examined for a long time at the Inquest. She agreed that the evidence heard at the Inquest was potentially relevant to her investigation. She told Dr Packham that she would be happy to review the Inquest evidence as it was relevant to her investigation but she never received this. Whilst this could have been interpreted as her leaving it to Dr Packham to decide if the Inquest evidence was relevant, she expected to see all relevant documents. In relation to the documents that the Trust had found after being ordered to find them by the Coroner, she asked to see them and they were sent to her. In relation to the email exchange between Mr Wright and Jane Rollinson, Mental Health Act and Referrals Manager, at page 389, Dr Mason thought she had seen this but it was embedded in another email. The patient high risk

profile documents and segregation reviews were found on the Respondent's RiO system.

58. Dr Mason confirmed in relation to the email exchange with Dr Packham at page 417 that she asked to be sent the Claimant's factual inaccuracies and additional documentation the Claimant thought existed but he failed to send them to her. She then said she did not make a further request for the documents but made a judgement call to concentrate on getting the report finished. The Tribunal found this to be difficult to understand since Dr Mason must have thought the documents were relevant but then simply did not bother making any further enquiry about them. In the context of an MHPS investigation, this could be said to amount to a dereliction of duty. This view was compounded by what we considered to be Dr Mason's evasive evidence as to why she did not pursue asking for the factual inaccuracies. She resorted to saying that the Claimant could have sent them to her but she had not asked her to do so and that she did not pursue them because evidence she found in the documents she had were discussed when she interviewed the Claimant. She then said that Dr Packham had told her they were not relevant and perhaps she should have asked the Claimant for them. She admitted it was a fair criticism of her that the Claimant had referred to the factual inaccuracies and she had not asked the Claimant for them.

59. Referring to page 472 and the Claimant's statement to Dr Mason that she saw CW in the presence of other staff, Dr Mason said she did not interview any of those other staff because it was a doctor's duty to make records or see that attendance on patients was properly recorded and an accurate reflection of the interaction. When referred to the review of the National High Secure Women's Service dated November 2017 by Dr Croft and Ms Clansy, Dr Mason said she had not seen this and was not aware of it. At page 435 and, specifically, paragraph 41 of that page, the report noted the burdensome workload of medical secretaries and PAs which caused difficulties in ensuring contemporaneous recording of clinical team meeting minutes and decisions and other meetings. This did not lie well with Dr Mason's evidence that if there was inadequate PA support a doctor should input records onto the system himself or herself. She said she "looked hard" at PA support but felt it was still the Claimant's responsibility.

60. Dr Mason was cross-examined at length about the detail of her report. Much of this detail is not particularly relevant to the issues in this case but the Tribunal noted that Dr Mason failed to speak to any member of staff who worked with the Claimant on the wards although she spoke to a number of people in administration and governance. As previously mentioned, she did talk about some systematic issues within Rampton but admitted she had not reviewed the Respondent's records policy and said maybe she should have mentioned it in her report. She accepted that the Claimant was very reliant on administrative support and if it was not available it would make her job more difficult. Dr Mason said that some of the Claimant's practices were not particularly unusual at Rampton and she found variability in how doctors were recording things. It was surprising to the Tribunal that, in these circumstances, Dr Mason failed to interview any other doctors.

61. We have some sympathy with Dr Mason due to the difficulties raised by Dr Packham's various amendments to the terms of reference of her investigation. However, having said that, she failed to even consider the Respondent's MHPS policy and failed to pursue documents which she had asked for but were not produced by Dr Packham. She also failed to interview any of the Claimant's clinical colleagues which would have enabled her to properly assess which issues were systemic and which lay at the Claimant's door alone.

Evidence of Mr P Wright

62. In the pleadings in this case and in the Claimant's evidence, Mr Wright, as Executive Director of Forensic Services, was heavily criticised. Having listened carefully to his evidence we formed the view that these criticisms were entirely justified. As we record below, we found his evidence to be almost totally unreliable. He displayed an almost total lack of knowledge of the Respondent's policies and procedures and gave the distinct impression that his actions and conduct following CW's death had their foundations in self-preservation and the protection of the reputation of Rampton Hospital. A recurring theme in his evidence when he was pressed, particularly in relation to certain conversations or actions, was that he could not remember.

63. Mr Wright said he was not very happy with the SUI report as it was pretty damning of Rampton as a whole. He considered there had been an attack on clinical judgement with Dr Silva forming a view on diagnosis without seeing the patient. Mr Wright said he challenged Dr Silva on this point saying he was surprised he was able to give a diagnosis and Dr Silva had replied "but I have read the notes". Mr Wright was also aware of the concerns of others in relation to the way Dr Silva had framed the witness evidence he was being given. In particular, the draft comments submitted by Dr John Wallace, Clinical Director, sets out in some detail the serious concerns raised by the witnesses and the manner in which their statements were produced by the investigation team and that when the witnesses disagreed with the summary, the investigation team challenged them or disagreed with their proposed amendments to their own statements. Mr Wright also confirmed that Dr Wallace in his comments on the draft report had said the criticism of risk strategies not being carried out was wrong. The Tribunal was surprised at Mr Wright's interpretation of Dr Wallace's comments at paragraph 7 on page 117. Mr Wright said that the comments were a disagreement rather than a real concern. In fact, it is clear that that paragraph is nothing of the sort. The comments are that three very experienced responsible clinicians who were all consultant forensic psychiatrists in charge of CW's care, including the Claimant, concurred on the diagnosis of CW and, in particular, that she was not suffering from schizophrenia.

64. At page 123a is an email from Mr Wright to Dr Hankin and Mr Wright was questioned on this email. The first bullet point relates to the conduct of the Claimant as raised in his telephone call with Dr Silva. Mr Wright notes, "My reflection on this after the call was, why haven't we acted before now?"

Mr Wright said in evidence that, notwithstanding this comment, he had not decided that this was a disciplinary issue and he was merely asking why there had been no decision on this previously. The second bullet point sets out Dr Silva's alleged thoughts that the conduct issues were about the diagnosis and a failure to see a very sick patient. When questioned about this, Mr Wright said, "There was a discussion. I can't get into my thoughts now. I thought there was a problem and our position could be questioned if we had not acted. I thought we needed to address the conduct question". In relation to the third bullet point concerning the Claimant's alleged failure to co-operate reasonably with the investigation, Mr Wright said he thought Dr Silva would be required to go to the Inquest and this could be bad for Rampton.

65. At page 126 the Claimant is responding to a request from Dr Wallace to comment on the draft SUI report. In particular, she states in connection with segregation notes (page 127) that they are not in her possession and the investigation team would be in a stronger position than her to obtain this material. Mr Wright's response to this was that the Claimant should have obtained these missing notes. He said it was her obligation to make the notes available to others caring for the patient and if they were not to hand, she should have made sure they were found. He said she did not produce them and she should have made sure after CW died that she had all the information needed to help the report. Somewhat remarkably, in our view, Mr Wright then said, "I took the view that if (the Claimant) hadn't produced them by now, we would not get them". Shortly afterwards in his cross-examination Mr Wright said that even though the Claimant said she did not have access to the missing records, he believed she should have produced them. We found this to be illustrative of a quite remarkable lack of knowledge of the medical ethics surrounding a patient's death. It is clear and rather obvious that if a patient dies whilst being treated, the clinician responsible for that treatment should not have access to the patient's medical records or any other records. Despite this, Mr Wright put all the blame for not producing these records on the Claimant who clearly had no access to them. It is even more remarkable that Mr Wright said that even though the Claimant said she did not have access to the missing records, he believed she should have produced them. He then contradicted himself by saying he was sure she did not have the notes but she had the resources to have the notes found and it was inexplicable why that had not happened.

66. Mr Wright then continued by saying, "At this stage, I felt if they (the notes) couldn't be found, they would not be". In response to a question from the Employment Judge, he said he did not entertain the idea that the Claimant could have doctored those notes if she found them.

67. Mr Wright said he had put the Claimant's factual inaccuracy comments to Dr Silva but it was not his role to delay the report or seek to influence or challenge the investigation or the report as this was not within his remit. He said the Inquest wanted any report available before the proceedings began. He wanted to avoid a Prevention of Future Death letter which would have been damaging for Rampton. He said he was not in a position to disagree with Dr Silva if he did not accept the Claimant's factual inaccuracies.

68. On 9 January 2017, Dr Clark sent his comments on the draft SUI report to Mr Wright. When asked if he forwarded these comments to Dr Silva, Mr Wright said, "I intended to forward Dr Clark's concerns to Dr Silva. I assume I did. They reflect serious disagreements with Dr Silva but if he declined to accept them, that is his right and we can't do anything about it". The Tribunal noted that this was another incident of Mr Wright being unable to remember something that was of significance in connection with Dr Silva's investigation.

69. At page 139 is the comment by the Claimant on the draft report. At page 140 she states she has no access to the missing notes but directed the investigating team to where they would find them. Mr Wright's view was that that was a matter for Dr Silva to decide whether he wanted to continue to investigate. He said that the Claimant had the duty to provide the investigation with the evidence they required. He said she had access to them but was on sick leave at the time and he took the view she had had ample time to produce them so was not going to produce them. He concluded by saying the Claimant had "had her chance and blew it". We note, but do not repeat here, the comments we made above in respect of the ethical issues surrounding this rather fatuous comment by Mr Wright.

70. Mr Wright was questioned on Dr Silva's attitude to the Claimant's comments on the draft report. His view was that Dr Silva did not disregard all of the Claimant's comments but did not take them all in. He noted that Dr Silva did not accept any criticisms of the procedure he followed and said he had difficulty dealing with Dr Silva who was not easily persuaded. He said that when the Claimant said she had no access to the missing notes but directed Dr Silva as to where to find them, Dr Silva did not look, neither did he and that he should have done so.

71. On 17 January 2017, Dr Silva emailed Mr Wright and Dr Hankin about the use of pinel belts and the regularity of observations and notes the comments of Dr Wallace about concerns about the process and content of the report. Dr Silva concludes his email by asking, "What are the concerns about the process and content?" Once more, Mr Wright said he could not remember if he ever responded to this email (page 213).

72. Mr Wright was again asked about the provision of the missing documents referred to by the Claimant. He said that in prison when someone dies the room is sealed off and all files collected. He thought the same things happen at Rampton but still said he was of the view that the Claimant should have provided the notes.

73. Mr Wright said he provided his witness statement to the Inquest on 21 March 2017. He had a telephone conversation with the Claimant before the Inquest as she had not wanted to meet with him. It was put to him that he asked the Claimant whether she was going to blame the Trust for CW's death. His reply was he could not remember what he said. He could not remember the content of the call but the Inquest would have been mentioned. He said his intention was to support the Claimant but she regarded his call as

suspicious. He did not keep any notes of the conversation and felt the call was counter-productive.

74. Commenting on Dr Clark's email to him at page 382, Mr Wright said it was not true to say the Respondent would simply look after itself. He said he found this comment by Dr Clark to be offensive as he wanted to support and protect staff. By way of example, he said the nursing assistant who falsified the observation records of CW was not disciplined. He said it was an awful situation and it would have been easier to have a scapegoat.

75. Mr Wright was questioned about his witness statement given to the Inquest (page 393). Whilst he was cross-examined in detail on this statement, there are a number of matters which are specifically relevant to the issues in this case. In paragraph 11 he said, "The SUI identified a limited review of (CW) by the RC in the months before her death. The Trust accepts this finding; this was not acceptable practice". His rationale for making this comment was that he had no choice but to accept what the SUI report said about record keeping because the Claimant had produced no evidence. Once more, we felt Mr Wright was persisting in his unreasonable view and conclusion that the Claimant was to blame for not producing documents she had no access to. Further, in paragraph 12, despite the Claimant having insisted she saw CW on a weekly basis and there were paper records to support this, he said he took the view that nothing was going to be found and he had to continue without it. He admitted that he did not discuss this with any ward staff and, once more, he could not remember what his preparation was. He accepted the Claimant had told him that multi-disciplinary team meetings had been held but there was no evidence of this. The Claimant had told him there were minutes of these meetings but they were not produced. He repeated that all of the Claimant's assertions were not supported by evidence and he had therefore accepted the SUI's criticisms of her. He added that the Claimant was not a scapegoat.

76. Mr Wright was referred to the review in November 2017 by Dr Croft and Ms Clansy at page 440 where it was stated in paragraph 69, "Additional documents relating to risk assessments, care plans and medical reviews which were held by the Trust were made available to the court. The Coroner was completely satisfied with these aspects of CW's care". Mr Wright could not remember the Coroner saying she was satisfied with care given to CW by the Claimant and that he did not remember any aspect of the Coroner's remarks about the care given to CW or being satisfied with the Claimant's care of her.

77. In relation to the missing documents which were found following the direction of the Coroner to find them, Mr Wright said at paragraph 18 of his witness statement that the documents were not found in the location indicated by the Claimant and, in his view, the Trust took all reasonable steps at the time to locate them. In his evidence, however, he said he formed the view that the documents did not exist. He confirmed he only made one call to the Claimant whilst she was off sick and could not remember when it was. He did not accept he placed her in a position where her career would be

damaged. He said he never had a conversation with her about the missing documents but then said he could not remember whether they spoke about them in their telephone call.

78. When the question of distributing the SUI report to the clinical team was discussed between Mr Wright and Dr Wallace, it was not possible to agree the wording of the covering email (page 386). Mr Wright once more said he could not remember the Coroner's summing up and the wording proposed by Dr Wallace and/or the Claimant which suggested the SUI findings were wrong and irrelevant and gave the impression that the Claimant was completely exonerated. Mr Wright wanted to remove the reference to the Trust in providing the missing documents and wanted to emphasise that the documents were found at the instigation of the Claimant. The Tribunal was of the view that this was nothing more than an attempt by Mr Wright to conceal the fact that the Claimant had been right all along about the existence of the documents and that the Trust only found them when ordered to search for them by the Coroner.

79. A major issue for the Claimant in relation to Mr Wright's actions revolved around his circulation of his witness statement to the Inquest to the senior medical team who were all colleagues of the Claimant (page 392). Of particular concern to the Claimant was that paragraph 11 of the statement, which we discussed above, accepted the allegation in the SUI report that the Claimant only conducted a limited review of CW before her death. He said the Trust accepted this finding and that it was not an acceptable practice. He accepted that his witness statement was misinterpreted and said it was a pity he was not at the meeting of the senior medical team to explain it. It appeared to the Tribunal that Mr Wright gave absolutely no thought to what repercussions could stem from his circulation of his witness statement which contained information which was effectively found to be inaccurate by the Coroner. He accepted it would have been a good idea to redact the points which were not put to the jury but he failed to do that. At page 416d Mr Wright attempts to clarify matters in an email to the senior medical team sent on 12 September 2017 saying there had been some confusion about this and he hoped he was not going to make it worse. He said his witness statement contained a number of admissions on behalf of the Trust, inter alia, about reviews. In the event, he said the reviews admission was not put to the jury because it was shown to be wrong when the Claimant gave oral evidence. He said, "This evidence enabled the discovery of records of reviews that had not been disclosed to the writer of the SUI report". We reminded ourselves that these documents were found overnight which casts serious doubt on Mr Wright's assertion that they were only found at the instigation of the Claimant. They could have been found well before the Inquest and in time for the completion of the SUI report had the Trust, under the direction of Mr Wright, looked for them properly. He said that he should have pressed harder for these documents. A large number of managers were involved in looking for the documents before he started work at the Trust. He wrongly accepted that was the end of the matter.

80. Mr Wright was referred to his involvement in the MHPS investigation. He said he undertook to provide the factual inaccuracies comments to Dr Mason. He said he could not remember but he would have been the person to do that. He did not remember if he sent them.

81. Referring to the email at page 482 from Dr Hankin to Mr Wright, he was reminded that Dr Hankin was referring to alleged advice from NCAS in relation to misconduct which was, "in line with where you wanted to take it anyway". In the light of this email, we consider there must have been conversations between Dr Hankin and Mr Wright where he had indicated the Claimant should be subjected to a conduct panel. In his evidence, he said he had not already made up his mind and he was unable to predict what process would be followed. In somewhat contradictory fashion, he then said it had always been in his mind since his conversation with Dr Silva that there was a question of conduct to be discussed. He said at the time of this email (23 February 2018) there had been no discussion about what Dr Mason's report concluded. He did not know whether Dr Mason had had the factual inaccuracies comments and, at this point, he did not know if there was a conduct issue. It was clear to the Tribunal that he completely changed his evidence in the space of a few minutes from considering it was a conduct issue to not knowing whether it was or not.

82. In relation to paragraph 25 of his witness statement, Mr Wright said he was part of the DMG which was convened by Dr Packham to discuss the MHPS investigation report and considered Dr Packham's decision that the Claimant should be referred to a conduct panel. He said the DMG agreed that, based on the outcome of the investigation, they should proceed to a conduct hearing. Somewhat bizarrely, Mr Wright then said he did not know when the DMG meeting took place. He could not remember and did not know if minutes were taken. Mr Wright then said that the DMG met after the email from Dr Packham to Dr Hankin (page 486). As with Dr Packham's evidence on the matter, we found Mr Wright's evidence in relation to the setting up and composition of the DMG to be totally unreliable.

83. Mr Wright said he drafted the speaking note at page 488 to help Dr Packham. He did not know whose suggestion it was to prepare a speaking note although it may have been someone from HR or his own, he could not remember. He said he just volunteered to prepare it to help out and this must have been following discussions outside of the relevant policy. He could not remember if there were meetings or telephone conversations regarding this approach. He said he did not tell Dr Packham to say what was included in the second bullet point at page 488 but this is what was agreed. In relation to the third bullet point, which states that the recommendation to take the matter to a conduct panel had been referred to a DMG which agreed there should be a disciplinary hearing, Mr Wright said at this point the DMG had not actually met. He then said he could not remember whether it met formally, informally or by telephone conversations. Putting the blame firmly at the door of others, Mr Wright then said that this approach was agreed between HR, Dr Packham and Dr Hankin. Mr Wright said that in referring to the next step being for the

matter to be passed to him to take further action in relation to the conduct panel, this did not give the impression he would be the decision maker.

84. Notwithstanding the totally confused evidence of Dr Packham and Mr Wright on the existence or otherwise and/or composition of the DMG, the email from Dr Packham, which was copied to Dr Hankin and Mr Wright on 14 March 2018 (page 489), states that there is no DMG process in existence. Mr Wright's evidence was that he thought the DMG already existed which is why he put it in the speaking note he drafted. He then said the DMG was created on 14 March 2018 and he thought it existed and had met. There is further confusion in the email of 15 March 2018 to which Mr Wright was copied in (page 491) which says that it had been agreed that Mr Wright would not hold the meeting with the Claimant as this would then keep him free to chair the hearing if necessary.

85. In relation to the meeting on 5 April 2018, Mr Wright contradicted Dr Packham's evidence that it was Mr Wright's initiative to hold the meeting and his evidence was that Dr Packham was not acting on his behalf. He then said it was the group's decision on the way forward and then that Dr Packham must have told him what had happened in the meeting but he could not remember. He was then reminded of the email to him from Dr Packham on 5 April 2018 (page 497) which confirmed the meeting had taken place and what happened in it.

86. Page 511 is an informal update sent by Mr Wright to advise senior personnel that, inter alia, there would be a conduct hearing in relation to the Claimant and that HR were working on the appropriate letter. He said Dr Packham had given him an update, that nothing had happened in relation to the options given to the Claimant and he had decided to go down the conduct route. Mr Wright's evidence was that sending this email was a bad mistake on his part and he apologised and apologised again. He accepted it was a serious breach of the Claimant's confidence and it was not normal practice to send such information to others in the Trust.

87. Referring to the email from Ian Whittle of the GMC at page 551 dated 13 December 2018, Mr Wright said he could remember the meeting but not the reason why he was invited. He said he could not recall the discussion about the Claimant being told there would be no referral to the GMC. He said they knew what the conduct was as it was in the report but he did not know where it fell into the Trust's disciplinary procedure. He said that dismissal was not the only option and he also accepted that Dr Silva did not have all of the evidence in preparing his report. He confirmed that at the time of this meeting, the Claimant had raised a grievance against him and he thought it was appropriate for him to attend. In response to questions from the Tribunal, Mr Wright said he thought there was a serious issue of conduct on the part of the Claimant and offering her retirement was a kind thing to do. He repeated that documents which were not readily available for the SUI inquiry and the Inquest was an issue but the Claimant should have access to them and know where they are. The Tribunal noted that, by this time, the

documents had been produced by the Trust and some were recovered from the RiO system.

88. When he was re-examined, Mr Boyd directed Mr Wright to page 662 which sets out some of the "offences" which may constitute gross misconduct under the Respondent's disciplinary procedure. Mr Boyd asked Mr Wright to confirm where the Claimant's conduct fell within this policy. Mr Wright's first answer was that it fell within (d), which the Tribunal noted was "Ill treatment or mishandling of service users or carers or any other form of negligence, including dereliction of duty and, for the avoidance of doubt, sleeping whilst on duty". The Employment Judge then interrupted and said he had not understood that the Claimant had ever been accused of ill treatment or mishandling of service users and Mr Wright confirmed that this was not what the Claimant had ever been accused of. Mr Boyd then asked him whether there were any other matters in the list which applied to the Claimant, to which Mr Wright referred to (k) which is, "Failure to comply with Trust policies, procedures and guidance relating to the use of IT equipment, email or the intranet or internet". The Employment Judge interrupted again to ask on what basis it was alleged the Claimant had abused the email or internet, to which Mr Wright replied, "I'm sorry, I don't know where it falls". Mr Boyd then referred Mr Wright to section 1 on page 661 and asked whether the Claimant's conduct fell within that section. The Employment Judge then indicated he thought Mr Boyd was leading Mr Wright through the procedure in the hope that he would recognise something which was relevant to the Claimant's conduct. Mr Boyd replied that he was doing no such thing and he was asking open questions, to which the Employment Judge indicated that he thought he was leading him through the policy to try to get a relevant answer. Mr Boyd said he would make a note and the Employment Judge said he would too. Notwithstanding this exchange, the Tribunal's view was that Mr Wright had absolutely no idea where the alleged conduct of the Claimant fell within the Respondent's disciplinary procedure and he displayed no familiarity with it at all.

89. For the above reasons, the Tribunal took note of the contradictions in Mr Wright's evidence, the contradictions between his evidence and that of Dr Packham, the fact that he could not remember many important events, his lack of action in relation to missing documents, his apportionment of blame on the Claimant for not producing documents she had no access to, the distribution to senior colleagues of a statement which effectively criticised the Claimant without clarifying that the Coroner disagreed with these comments in the SUI report and his willingness to seek to blame others for a number of events. We found his evidence to be unreliable.

Evidence of Dr Murjan

90. We have no reason to doubt any of Dr Murjan's evidence. She answered questions without hesitation and was not at all evasive. It was clear to the Tribunal that she had little knowledge of the reasons behind the Claimant's retirement but thought there were certain confidential matters which were not shared with her. She did say that she thought the Claimant

was a perfect fit for the role in the Gender Clinic because of her vast experience in carrying out this work previously. Other than that, we did not consider that Dr Murjan's evidence had much bearing on the issues in this case.

Evidence of Dr J Hankin

91. Dr Hankin is the Executive Medical Director of the Respondent and is a Consultant Psychiatrist by background. At the commencement of her evidence she affirmed that her witness statement was true to the best of her knowledge and belief.

92. From the outset of her evidence, Dr Hankin did not answer questions spontaneously and there were often delays in questions being asked and answered from which we formed the impression that she was often being extremely careful with her evidence. Dr Hankin gave evidence for several hours and we highlight below what we consider to be the most relevant parts of that evidence.

93. Dr Hankin said she has bi-monthly meetings with the GMC liaison officer which includes a discussion about open cases and new MHPS reports so the GMC is aware of what is going on. She confirmed there is a record of these bi-monthly discussions but no records were in the bundle. We found this to be a glaring omission because Mr Whittle's email to Dr Hankin (page 551) refers to a meeting he had with her and Mr Wright. A significant issue in this case is whether Dr Hankin, Mr Wright and others were, to quote an expression used in evidence in this case, hanging the Claimant out to dry. If there was a record of the discussion with Mr Whittle, it should have been produced to rebut that allegation.

94. Dr Hankin did give evidence to the effect that the Trust was already on a warning in relation to the previous death of a patient in 2015. She states in her witness statement at paragraph 8 that the CQC had put restrictions on Rampton Hospital after raising many issues around segregation and recording reviews in the Hospital generally. She said those systemic issues were being addressed, which was one of the reasons that it was not felt necessary to restrict the Claimant further.

95. We found that Dr Hankin's evidence did at times suggest that the Claimant was being singled out. For example, she acknowledged that handwritten records were still a problem. She said everybody should have been recording their reviews of patients but not all of them did. She suggested the focus was on the Claimant because it was highlighted in her case although an audit was carried out after CW's death which showed inconsistencies of practice. This was, of course, a matter also noted by Dr Mason. The Tribunal noted that no action was taken against other consultants who clearly had issues with recording matters on the RiO system but only the Claimant seems to have been taken to task over this through the MHPS investigation.

96. In relation to the missing documents, she said she understood that Mr Wright had a "substantial team" looking for them and she had several conversations with Mr Wright about this. Mr Wright had been clear in his evidence that he believed the documents did not exist but Dr Hankin said he never told her that.

97. Dr Hankin also impliedly criticised Mr Wright in connection with the release of his witness statement to the Inquest. In particular, paragraph 4 of that statement (page 395), stated that the Trust accepted most of the findings and recommendations of the SUI investigation, specifically in relation to shortcomings in the risk assessment, the record keeping, of the observation process and policies as well as particular failings on the day of CW's death. Dr Hankin said that if she had seen this before it was released she would have intervened with a caveat stating that the SUI had raised some other concerns which had led to other processes which had not been concluded.

98. Dr Hankin admitted that after the SUI report, she did not sit down with Mr Wright to consider the findings with him. She was concerned that he was so involved as a non-clinician. She said that looking back she should have been more involved and that was a failing. It was not reasonable to take this course of action and "a key learning for me".

99. She also said that after CW's death there were concerns that, as there was already a warning from CQC, there was a real risk of being subjected to a Prevention of Future Death letter which the Trust was expecting.

100. Dr Hankin was referred to pages 416b and c which comprised a letter from Dr Egleston expressing concerns at the potential lack of support for consultants after what had happened to the Claimant. In releasing Mr Wright's statement, she acknowledged that the Claimant's treatment "was bad but not deliberate". She further accepted that the Claimant's reputation was damaged by Mr Wright's statement as it was made public. She noted that she had seen the report dated November 2017 written by Dr Croft and Ms Clansy (page 440). She said the documents found by the Trust were risk assessments, care plans and medical reviews. Patient High Risk Profiles were recovered from the RiO system and she said she did not understand why they could not have been found previously,

101. Dr Hankin said other consultants were horrified by the way the Claimant was treated in Mr Wright's statement.

102. She said the decision to proceed to a conduct hearing was based on the MHPS report by Dr Mason and advice from NCAS. The Tribunal noted that Dr Hankin did not really have an answer when it was put to her that Dr Mason said there were systemic issues but only the Claimant was held to this standard and not other consultants. Indeed, Dr Hankin became extremely flustered and replied that she would expect these things to be done.

103. When questioned about the decision to proceed to a conduct hearing, Dr Hankin was referred to pages 482 – 485. Page 482 is her email to Mr

Wright referring to the NCAS advice adding that it was "where you wanted to take it anyway". Her response was that an individual may have a view but they would not have acted on it without further advice. On the same page is Dr Packham's email to Dr Hankin saying at point 5.1, "Consider this under misconduct …". In her witness statement at paragraph 19, Dr Hankin said NCAS advised the Trust to update the Claimant and to invoke the Trust's conduct policy to discuss misconduct issues. The NCAS letter was subsequently copied to Dr Hankin which clearly stated at page 484 of the bundle, "… if you decided there was a case of misconduct …". She acknowledged that the NCAS letter was entirely predicated on the MHPS report and what Dr Packham had told them. NCAS did say that if it was decided to proceed with a conduct hearing a DMG should be established. Dr Hankin said she was a member of that group but, as with the other witnesses for the Respondent who were involved, she did not have the dates it met, then she said they met in February and that there should have been a log of the meeting but she did not have a copy if one existed. She agreed it was poor practice that the meeting was not documented. She then said the DMG did not meet in March but then that there was such a meeting. The Tribunal noted that Mr Wright, Dr Packham and Dr Hankin gave entirely contradictory accounts of the establishment of the DMG and how and when it met.

104. In respect of the GMC referral, Dr Hankin accepted that the Claimant was told in her meeting with Dr Packham on 5 April 2018, as noted by Dr Clark (page 499), that resigning would mean the end of the disciplinary process. She insisted it was the GMC liaison officer who insisted the matter should be referred to the GMC when he learned they were not proceeding with a conduct a hearing.

105. It is the Claimant's case that she only found out about the GMC referral when the GMC wrote to her. Dr Hankin produced the letter at page 554 which she said was sent to the Claimant. She said, "I signed it and it went as far as I knew". The Tribunal did not find this evidence reliable and preferred the Claimant's evidence that she did not receive this letter. We came to this conclusion based on the hesitancy of Dr Hankin's evidence throughout her cross-examination.

106. Dr Hankin disagreed that this represented a "hatchet job" on the Claimant. She said it was not her memory of the meeting with Mr Whittle, the GMC Liaison Officer. She then said she did not remember the conversation but she would not have made notes of the meeting because Mr Whittle usually sent through his note of it. This is the email at page 551 and the Tribunal notes it makes no reference to any comments made by Dr Hankin or Mr Wright.

107. But it was with reference to the Claimant's victimisation allegations that Dr Hankin's evidence took on a disturbing aspect. There were significant pauses before she answered questions.

108. Specifically, Dr Hankin was challenged about the delay in responding to the Claimant's application for the position in the Forensic Gender Clinic.

She had emailed Dr Hankin on 24 October 2019 but Dr Hankin did not reply until 6 April 2020. She said she wrote her reply (page 622) when she realised she had not responded. She denied she only responded after the Respondent's response to the victimisation claim had been submitted. In her witness statement at paragraphs 45 and 46, Dr Hankin said that, in order for the Claimant to return to any kind of appointment within the Trust, "we would need to complete the MHPS process and deal with the outstanding conduct concerns". In paragraph 46, Dr Hankin said that the GMC had felt there were concerns so she needed to satisfy herself that those were concerns the Trust could address. Dr Hankin said in response to a question from Ms Grace that paragraphs 45 and 46 were not included in her witness statement as an attempt to defend the victimisation claim. She was pressed on this again by Ms Grace who asked her whether she would like to withdraw paragraphs 45 and 46 of her witness statement. After a very long silence, Dr Hankin confirmed she wished to withdraw those paragraphs from her witness statement.

109. The Tribunal considers this to be a very serious matter indeed. At the commencement of her evidence, Dr Hankin affirmed and said the contents of her witness statement were true to the best of her knowledge and belief. At the conclusion of her evidence, she confirmed that not all of the statement was true to the best of her knowledge and belief. We consider that paragraphs 45 and 46 were a fabrication and, as suggested by Ms Grace, an attempt to defend the victimisation claim.

110. We must take very seriously any attempt to give false evidence. Whilst it is to Dr Hankin's credit that she admitted this, it is to her detriment and that of the Respondent and its advisers that parts of her statement prove to be false. Any objective bystander would understand why in the circumstances, along with the other contradictions in her statement, we had to conclude that Dr Hankin's evidence was unreliable.

Summary of the evidence

111. The Tribunal in this case took the fairly unusual decision to examine the evidence of the witnesses in some detail. As the case progressed, it is fair to say that our concern about the reliability of the Respondent's witnesses grew on an almost daily basis. It is clear from the evidence of Dr Hankin and, in particular, Dr Mason, that there were systemic issues at Rampton involving the care of patients. Despite this, there was not a shred of evidence given that these systemic issues were ever addressed by the Respondent. However, those issues were clearly addressed in relation to the Claimant.

112. We had no doubt that there was extreme concern, principally in the minds of Mr Wright and Dr Hankin, that Rampton would be heavily criticised by the Coroner and might receive a Prevention of Future Death letter. Given the criticisms and warnings from the CQC already in place in relation to a previous death in 2015, this would have reflected incredibly badly on Rampton Hospital. We believe it was clearly in the minds of Mr Wright and Dr Hankin to

blame the Claimant by highlighting issues with her record keeping, despite the fact they applied equally to other consultants.

113. The Claimant seems to have been a scapegoat in relation to CW's death. This may not have been the case had the Claimant's written notes been recovered when she first raised their existence. Mr Wright gave evidence that he did not believe the documents existed. He said he instigated a search for them. We do not accept that he did. No emails instructing a search to be undertaken were produced. We also wonder what his motivation would have been for instigating a search for documents he did not believe existed. We also note that no evidence in the form of emails or records of conversations was produced as evidence of his instruction to anyone within the Respondent to search for the missing documents. It was our conclusion that he did nothing. This is further illustrated by the very short period of time it took for the documents to be found after the intervention of the Coroner.

114. Dr Silva did not give evidence but it was clear to us that, upon any reasonable analysis of his report and the circumstances surrounding it, there were serious issues with it. Witnesses raised concerns over what appear to have been abrasive interviews conducted by Dr Silva with statements produced in summary form only. There were complaints that corrections offered to Dr Silva in respect of those statements were ignored. He blamed the Claimant for not producing documents which she clearly had no access to. He seems to have ignored her factual inaccuracies comments. He also seems to have been able to diagnose a deceased patient with schizophrenia without ever having examined her. Notwithstanding these serious issues with his report, both Dr Hankin and Mr Wright failed to criticise it allegedly through fear of tainting its independence. In our view, the acceptance of the SUI report was deemed appropriate because it was critical of the Claimant's care of CW.

115. Mr Wright suffered from serious memory lapses in relation to important matters, which we have highlighted above. We found him to be an evasive witness with an agenda that, at all costs, blame should be attached to the Claimant rather than the Respondent in any respect. This led to his speaking note delivered by Dr Packham to the Claimant. By any stretch of the imagination, the fact that the Claimant was given no indication of what the meeting was about and its content was, in common parlance, a hijack. We accept entirely the view of the Claimant that she was given little choice but to resign, retire or face a conduct hearing, the process for which would lie in the hands of Mr Wright. Mr Wright's actions in then informing the Claimant's colleagues that she was to face a conduct hearing was, as he acknowledged, a significant breach of confidence. In our view, it was yet a further illustration of his desire to shift blame onto the Claimant. The circulation of his witness statement to her colleagues is a further illustration of this. In relation to these two matters he now acknowledges them as errors. His hindsight does not assist the Claimant and did not at the time.

116. Following on from the meeting with Dr Packham, his chasing of the Claimant for a response was inappropriate. We also noted the changes in the

terms of reference for the MHPS investigation and his apparent failure to set up that investigation in accordance with the Respondent's own policy.

117. The Tribunal formed the very strong impression that Dr Hankin, Dr Packham and Mr Wright were intent upon seeing the Claimant removed from her post one way or another. They did this in a manner which was calculated or likely to ruin her reputation to better lay the blame for CW's death at her door. We completely accept the Claimant's evidence that Mr Wright asked her before the Inquest whether she was going to blame the Respondent. We do not accept at all Mr Wright's evidence that the telephone call he made to the Claimant was a welfare call because she had been on sickness absence for some time. The processes followed by these three witnesses were the subject of contradictory evidence. As a glaring example, we refer to the setting up of the DMG. Their evidence was so contradictory that we do not believe that group was ever formed or met.

118. Dr Mason's report must be considered to be unreliable. She did not read the Respondent's policy on setting up MHPS investigations. She asked for documents which were not delivered then concluding that they were not relevant even though she had not seen them. She did, however, identify some systemic issues within Rampton. As already discussed, these do not appear to have been addressed despite her conclusions and despite reference by Dr Hankin to an audit confirming such issues.

119. It is not disputed by the Respondent that the Claimant was told that if she resigned or retired there would be no conduct hearing, neither is it disputed that it was made clear to her that there would be no referral to the GMC. When a witness withdraws a critical part of their witness statement, having already affirmed that it is true, it is difficult to rely on anything that witness says. We accordingly do not consider Dr Hankin's evidence to be reliable in relation to the Claimant. Whilst Dr Hankin said it was the GMC Liaison Officer who said the Claimant should be referred to the GMC, this resulted from a meeting with Dr Hankin and Mr Wright, of which there are no minutes. It was a recurring theme in relation to the Respondent's witnesses that meetings or discussions were not minuted.

120. In relation to the Claimant's application for the post in the Forensic Gender Clinic, the evidence points to Dr Hankin being intent on the Claimant not being successful in her application. The withdrawal of the final two paragraphs of Dr Hankin's statement is clear evidence that the alleged need for conduct issues to be dealt with if she returned to the Respondent's employment was a complete fabrication designed purely as a defence to the claim of victimisation. The reality is that the evidence of this witness has ultimately actually reinforced the victimisation claim.

Findings of fact

121. In relation to the issues, we find the following facts:

122. The manner in which the SUI was investigated did not give the Claimant a reasonable opportunity to challenge Dr Silva's findings or take into consideration the ethical issues which prevented the Claimant from accessing written records she said existed. In particular, Mr Wright and, to a lesser extent Dr Hankin, made no attempt to challenge Dr Silva's comments and conclusions even though he seemed intent on bulldozing his own views through despite the concerns of the Claimant and other staff at the high-handed manner in which he proceeded. In particular, his diagnosis of schizophrenia in a deceased patient whom he had never met or treated should have been challenged by Mr Wright and/or Dr Hankin. It was incumbent upon them to properly consider the Claimant's comments.

123. The circulation of his statement to the inquest by Mr Wright without appropriate qualifications was either intended to damage the Claimant's reputation or reckless as to whether it was damaged. It formed part of Mr Wright's attempt to deflect attention away from other systemic issues at Rampton Hospital.

124. Although Mr Wright maintains that not all of his witness statement was referred to at the Inquest, he failed to make clear that the Claimant had disagreed with many of the SUI conclusions. It would have been a simple matter for a fair-minded employer to make this clear. He knew, or should have known, that his statement in its entirety would become a matter of record.

125. Mr Wright says he did not believe documents referred to by the Claimant as evidencing her attendance on CW existed. He gave no detailed evidence as to what efforts he made to search for them. We find he made no such efforts because not finding them would enable him to continue to deflect attention away from the Respondent and avoid a Prevention of Future Death letter by relying on inaccurate findings that the Claimant did not attend CW as she had insisted she had.

126. Whilst the SUI, MHPS and Inquest had different remits, continuing with the MHPS investigation had the sole purpose of laying the blame for CW's death at the Claimant's door. Dr Packham's various amendments to the MHPS terms of reference were an attempt to focus attention on the alleged shortcomings of the Claimant's care and away from any systemic issues at Rampton. They clearly had the effect of confusing Dr Mason.

127. There was a deliberate effort to withhold important documents and facts from Dr Mason such as the Claimant's list of factual inaccuracies showing the conclusions of the SUI were disputed, Inquest documents and the Coroner's findings. This was designed to ensure Dr Mason concluded that the Claimant was culpable in CW's death. Dr Mason failed to chase up documents she had requested, knew little about the procedure she should have followed and towards the end of her investigation became more interested in finishing it than properly considering documents the Claimant referred her to.

128. Mr Wright circulated the SUI report within the Respondent Trust on 15 August 2017 without reference to the Claimant's noted inaccuracies within it and, in our view, deliberately used ambiguous wording regarding the Claimant's evidence and the Coroner's findings at the Inquest. Mr Wright's intention was to focus attention on the Claimant being culpable in CW's death.

129. Similarly, Mr Wright had the same intention when circulating his Inquest witness statement to the Respondent's Medical Staff Committee on the same date by failing to correct the inaccuracies within it.

130. The Claimant's meeting with Dr Packham on 5 April 2018 produced a threat from Dr Packham that she should retire, resign or face a conduct hearing. This effectively only gave the Claimant one option. The manner in which this meeting was arranged after a decision taken by Mr Wright and Dr Packham amounted to hijacking the Claimant, was an attempt to force her out of employment and was not a without prejudice meeting. This unreasonable conduct was compounded by Dr Packham's unreasonable pressure on the Claimant to give her decision within a very short time of their meeting.

131. Mr Wright's circulation of a document to the Claimant's consultant colleagues informing them that she was to be subject to a conduct hearing was a blatant breach of confidence. At the very least, this was a totally reckless action which Mr Wright knew, or should have known, would damage the Claimant's standing and reputation within the Respondent Trust.

132. The Claimant was a leading clinician, indeed perhaps the only one in the UK, who had through her experience at the Respondent expertise in forensic gender matters. We find that Dr Hankin denied her the opportunity to apply for the role of Forensic Physiatrist at the Respondent Trust after her retirement in a manner which indicated she did not want the Claimant to be appointed to that role. It is clear that conversations had taken place between the Claimant and Dr Murjan about the role which the Claimant was eminently qualified to fulfill. The fact that the Claimant was not appointed to that role or her application even acknowledged for such a long time was as a result of Dr Hankin not wanting her to be appointed. The Claimant accordingly suffered detriments at the hands of Dr Hankin.

133. These detriments arose as a result of the Claimant bringing a claim against the Respondent in June 2019.

Submissions

134. Both Ms Grace and Mr Boyd helpfully provided written submissions and gave oral submissions on 18 December 2020. We are grateful for the concise manner in which both the written and oral submissions were made. They were detailed and we summarise them below. However, we make the point that we fully considered all submissions in our deliberations.

135. For the Respondent, Mr Boyd outlined the law in relation to constructive unfair dismissal and victimisation before considering the specific

issues relative to this case. He firstly argued that it was not clear as to whom the Claimant complained about the SUI investigation but it was necessary to understand that the Respondent could not interfere with what was an independent inquiry. In any event, Mr Wright had been even-handed, specifically in relation to the disagreement over diagnosis of CW's condition in his evidence to the Inquest. Further, Mr Wright had been fair in his comments to the Inquest in relation to certain systemic issues and failings on the day of CW's death in the observations process. He further submitted that the missing documents which were found after the Coroner's intervention were the subject of correspondence from Dr Silva and lack of input from the Claimant as to where they could be found.

136. Mr Boyd further argued that continuing with the MHPS investigation could not amount to a fundamental breach of the implied term of trust and confidence since the Claimant had a full and complete opportunity to raise her factual inaccuracies with Dr Mason and, in any event, the real issue was whether Dr Mason properly investigated the terms of reference ultimately agreed by Dr Packham.

137. In relation to allegations specifically against Mr Wright in connection with circulating the SUI report and his statement to the Inquest, these were not acts which were destructive of trust and confidence but were effectively even-handed.

138. In relation to the meeting on 5 April 2018, it was in effect a without prejudice type of discussion so could not be relied on by the Claimant.

139. Mr Boyd argued that Mr Wright's circulation of a document to the Claimant's colleagues advising that she was to be subject to a conduct hearing could not amount to a breach of the implied term of trust and confidence because the Claimant accepted that it was sent in error and had delayed for a further three weeks after its circulation before resigning and that resignation had been based on the meeting of 5 April 2018, which had taken place some two months earlier.

140. In relation to the claim of victimisation, the Respondent's case is essentially that there is doubt over whether relevant protected acts took place and, even if they did, there was no causative link between them and any detriment to the Claimant in relation to the Forensic Gender Clinic role.

141. In his oral submissions, Mr Boyd argued that the Claimant had affirmed any fundamental breach by taking 6 weeks to confirm her retirement and then serving a lengthy notice period.

142. In relation to other matters, he argued that the systemic issues in place at Rampton did not absolve the Claimant from criticism and she had acknowledged her failings in record keeping. Further, in relation to Dr Mason not having all documents to hand, the Claimant had a copy of the Inquest notes but had not produced them. It was not appropriate for the Respondent to have intervened in the SUI process as this would have tainted its

independence. The fact that the Claimant resigned two months after the meeting on 5 April 2018, which she describes as the final straw, was an insurmountable obstacle to her claim of constructive dismissal succeeding. In relation to the Forensic Gender Clinic role, he submitted that the Claimant complains about being punished in her application for the role but her complaint predated the protected act she now relies on. Mr Boyd also made light of Dr Hankin's withdrawal of the final two paragraphs of her witness statement which merely endorsed what the GMC had concluded.

143. For the Claimant, Ms Grace said the absence of Dr Silva to give evidence meant that any arguments raised by the Respondent to rebut the Claimant's allegations against him could not be challenged or fully tested. The withdrawal by Dr Hankin of parts of her witness statement was evidence of the unreasonable and unfair manner in which the Respondent has approached its evidence and the withdrawn paragraphs were calculated to cause further harm to the Claimant's reputation as a means of defending the victimisation claim. Mr Wright's evidence should be given little weight and Ms Grace particularly referred us to his difficulties with the Respondent's misconduct policy, which the Tribunal has already referred to above. She also highlighted inconsistencies in the evidence given by the Respondent's witnesses including the date the DMG was formed, the failure to record its decision or whether such a group even existed; the failure to record any decisions regarding the misconduct investigation or to identify the misconduct on which the investigation was based; and for the failure to record conversations between Dr Hankin and Dr Silva around factual inaccuracies.

144. On the other hand, the Claimant's evidence was consistent and made concessions where it was appropriate to do so, as did Dr Clark. In the light of these matters, the Claimant's evidence should be preferred over that of the Respondent's witnesses.

145. Ms Grace submitted that there was a breach of the implied term of trust and confidence in the manner in which Dr Silva conducted his investigation, that the Respondent failed to support her when she raised issues about the SUI report and that when her missing notes had been found, the Respondent failed to provide them to Dr Mason and the GMC.

146. In her submissions, Ms Grace heavily criticised the evidence of Mr Wright. This included in not being able to remember the contents of the telephone call he made to the Claimant before the Inquest, the contents of his witness statement to the Inquest and the fact that he said the Trust accepted most of the findings and recommendations of the SUI report. Further, Mr Wright had said it was not his job to point out what documents were missing after the Claimant notified him that some documents were missing. The implication was that Mr Wright was attempting to exonerate the Trust and blame the Claimant by perpetrating an unbalanced and unsubstantiated view of the Claimant's care of CW. There was a further submission that Dr Hankin's evidence in relation to the missing documents and, specifically, that Mr Wright had a substantial team looking for them, was not based in fact. She had never said this before and accepted she had never seen the

documents in question. These documents were very important because they changed the trajectory of the Inquest such that the Claimant's care of CW was no longer in doubt. Mr Wright had ultimately accepted he did not look for the documents and all of this meant that the failure to produce them (when they were so easily found) damaged the Claimant's reputation and her trust in the Respondent.

147. In relation to continuing with the MHPS investigation, although this had a different remit to the Inquest, the Respondent effectively refused to provide the same evidence to Dr Mason. Dr Hankin had said that note taking was serious and justified continuing with the MHPS but she had not seen the notes, seemed unfamiliar with the way the ward at Rampton was run, knew little about care plans and treated the Claimant differently to others. There were also serious issues with Dr Mason's investigation. In particular, she had never seen the Respondent's MHPS policy and failed to respond to the Claimant's request to view care plans. Further, Dr Packham failed to give Dr Mason relevant documents and failed to comply with requests to provide them. There were also serious failings by Mr Wright in relation to information from the Inquest being supplied to Dr Mason. Dr Mason herself had, it was submitted, exaggerated the report's findings in her evidence in such a way that her knowledge of the whole MHPS process was lacking and its conclusions could not be relied on because of the Respondent's failure to give her relevant documents.

148. In relation to Mr Wright circulating his Inquest statement, Ms Grace submitted that this was calculated to cause damage to the Claimant. This is evidenced by documents already referred to.

149. In relation to the meeting on 5 April 2018, the Claimant had no idea what this meeting was about, it was without proper notice and she was told she did not need representation. The meeting contained misrepresentations designed to induce the Claimant to terminate her contract. It was not a without prejudice meeting. This meeting alone was sufficient to found a constructive dismissal claim.

150. Mr Wright circulating a document to the Claimant's colleagues telling them she was to be charged with misconduct constituted a serious breach of contract.

151. Ms Grace urged the Tribunal to find that the Claimant had been victimised and noted that the Claimant only found out she was no longer eligible for the Forensic Gender Clinic role after she brought her first employment tribunal claim. When she was told she could apply for the role her application was ignored until she brought the victimisation claim when it was refused for a failure to comply with the Respondent's retire and return policy. The Respondent's explanations for the Claimant not being given the role were inadequate and their evidence now introduced conversations with Dr Brewin, Chief Executive of the Trust, which had not been referred to in the Respondent's Response to the Claim. Dr Hankin's assertion that the Claimant would have to be taken through a conduct procedure if she returned

to the Trust had never been mentioned prior to the witness statements being drafted. Further, for the first time in these proceedings, Dr Hankin raised difficulties with the Claimant only working one day a month without a parallel clinical practice. In Ms Grace's submission, this all arose out of resentment for the Claimant bringing her claims.

152. Ms Grace also submitted that Dr Hankin's evidence, in implying that there was still a live misconduct investigation against the Claimant was malicious, oppressive and high-handed conduct which only serves to harm the Claimant. Aggravated damages would therefore be appropriate.

153. In her oral submissions, Ms Grace highlighted that the Respondent's witnesses were not familiar with certain documents such as care plans because they had never worked in a psychiatric environment. In particular, Dr Hankin did not know what a care plan was. The fact that the Claimant accepted she could have done something better, ie record keeping, does not cure the breach by the Respondent. The fact that Dr Hankin withdrew paragraphs 45 and 46 of her witness statement shows they were purely aggressive in nature and Mr Wright's first sight of the Respondent's misconduct policy was farcical. The Claimant's case is that this is clearly one of constructive dismissal. It would be an error of law to hold that the breach has been affirmed. It was necessary for the tribunal to make an objective assessment noting that Dr Silva concludes CW died because the Claimant misdiagnosed her condition. Mr Wright made his statement to the Inquest relying on the SUI report because he feared a Prevention of Future Death report and this is why he was so dismissive of the fact that Dr Silva's report might be wrong about his diagnosis of CW. Mr Wright's statement was focused on blaming the Claimant and portrayed her as someone who repeatedly made errors. This is despite the fact that he had seen her factual inaccuracies and ignored them. It was clear the Claimant was hung out to dry.

154. In relation to the missing documents, Ms Grace noted that the Claimant did not have access to them. She had explained they existed but did not know where they were. It was a serious ethical issue for her to be involved with them after CW's death but the Respondent made no attempt to find them. In relation to the allegation that the Claimant could have given the Inquest notes to Dr Mason, it was the Claimant's evidence that she offered the CDs to her as did her solicitors but it is a condition of them being supplied that they may not be shared. It would be remarkable if the Respondent's solicitors did not have the Inquest notes.

155. In relation to the meeting of 5 April 2018, it was not a without prejudice meeting and was calculated to make the Claimant think she had no choice. It was difficult to imagine a situation more likely to damage trust and confidence. Further, the Claimant had no choice but to give six months' notice of her retirement and this did not amount to an affirmation.

Discussion and conclusions

156. We first address the issue of constructive dismissal. It is accepted that the Claimant had the benefit of the implied term of trust and confidence owed to all employees by their employers. We remind ourselves that we should consider the case on an objective basis.

157. We have concluded that at almost every point from the death of CW to the Claimant's notification that she would retire, the implied term was fundamentally breached by the Respondent. This effectively began with Mr Wright's failure to question Dr Silva's inappropriate conduct of the SUI as evidenced by the Claimant's evidence and serious concerns raised by others who were called upon to give statements. Whilst we accept that such inquiries should be independent, we take the view that Mr Wright, in particular, deliberately failed to look for documents and challenge Dr Silva's autocratic approach to the SUI.

158. The final act meeting between the Claimant and Dr Packham was engineered in no small part by Mr Wright. In that meeting the Claimant was given no choice but to end her employment or face a conduct hearing under the control of Mr Wright. Following ***Malik and Baldwin***, as Mr Boyd points out, there will be a breach of the implied term of trust and confidence if an employer, without reasonable and proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

159. Both Counsel in their introductory submissions refer to the Judgment in ***Kaur*** where Underhill, LJ set out the following test:

> *"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?*
>
> *(2) Has he or she affirmed the contract since that act ?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? …*
>
> *(5) Did the employee resign in response (or partly in response) to that breach ?*"

We note, in particular, Underhill, LJ's comment that:

> "*If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage: even if it had, and*

the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so."

160. Ms Grace also notes the judgment of the EAT in ***Moores,*** where it was stated that an employer may also be responsible for acts of third parties in the context of constructive unfair dismissal. Certainly, the manner of Dr Silva's conduct of the SUI left much to be desired. His treatment of the Claimant in relation to accusations that she was uncooperative, ignoring her comments, making a diagnosis of schizophrenia without having examined the patient, seemingly writing inaccurate statements for witnesses and ignoring their protests is sufficient in itself to pass the ***Malik*** threshold.

161. We also accept the relevance of ***Sandhu*** in cases where there has been some attempt to discuss or negotiate between the parties but where there has still been an unfair dismissal. However, in this case, ***Sandhu*** is distinguished as we have found the meeting between the Claimant and Dr Packham was not a discussion or negotiation, but rather in the nature of a threat.

162. The tribunal noted the marked inconsistencies between the evidence of the Respondent's witnesses, the obvious lack of knowledge of the Respondent's policies and how to implement them, the fact that Dr Silva did not attend to give evidence (even though the Respondent may be accountable for his actions) and the lack of any documentation supporting important conversations. As the hearing progressed, it became increasingly obvious that the Respondent's witnesses were intent on holding the Claimant solely accountable for CW's death in order to deflect any hint of culpability away from the Respondent and themselves and towards the Claimant. On the evidence, we can only conclude that these actions were deliberate or taken without any concern as to the effect they would have on the Claimant.

163. Even to those without medical qualifications, it is impossible to conclude that Dr Silva's SUI investigation and report was anything other than unreasonable and inaccurate. Despite complaints and criticisms by other members of staff as well as the Claimant, Dr Silva clearly continued in an autocratic manner and the Respondent, through Mr Wright and Dr Hankin in particular, did absolutely nothing to heed the complaints being made. They ignored the Claimant's factual inaccuracies, being content to adopt the label of "differences of opinion". They remained silent when it became clear that Dr Silva found the Claimant culpable in CW's death even though he could not reasonably have concluded she suffered from schizophrenia. More importantly, Mr Wright made no attempt to find the missing documents the Claimant said existed, which she no longer had access to and in respect of which Dr Silva accused her of being uncooperative. The Respondent's witnesses have tried to hide behind the independence of the SUI for failing to support the Claimant but we conclude that they chose to take no action because it suited their purpose in putting the blame solely at the Claimant's door.

164. In reaching our conclusion on this point, we note Mr Boyd's submission that it cannot be a breach of the Claimant's contract of employment for the Respondent to fail to take into account the concerns of members of the Respondent's staff other than the Claimant at the manner in which the SUI was investigated. We do not accept that submission. The failure of the Respondent to raise these issues and concerns directly impacted on the Claimant as the Respondent's witnesses knew it would.

165. Mr Boyd also asks that the tribunal sets out what the Respondent should have done in order to take into account of the Claimant's concerns and, presumably, to avoid being seen to be attempting to interfere with Dr Silva's independence. The comments of other staff members should have been taken up with Dr Silva directly because to do so does not interfere with his independence but would have ensured a more balanced report. Further, to fail to point out to Dr Silva that his diagnosis of schizophrenia had to be questionable in circumstances where it formed the basis of his conclusion that the Claimant's misdiagnosis caused CW's death, showed a complete disregard for the Claimant's welfare and professional reputation. Finally, failing to properly look for and produce the documents the Claimant said (correctly) existed was a deliberate act on the part of Mr Wright with the intention of shifting the blame away from the Respondent's systemic issues and towards the Claimant. These actions amounted to a fundamental breach of the implied term of trust and confidence.

166. As with most of his evidence, we viewed the circumstances surrounding Mr Wright's statement to the Coroner's inquest with some circumspection. This begins with his 'phone call to the Claimant before the Inquest which he described as a welfare call but subsequently admitted that the subject of the Inquest would have been brought up. Conveniently, he could not remember the details of the call whereas the Claimant, whose evidence we did find reliable, recalls Mr Wright asking whether she intended to blame the Trust. This is a further illustration of his primary concern that the Respondent should not be blamed and there should be no prevention of future death letter.

167. Mr Wright's statement to the Inquest effectively perpetuates Dr Silva's conclusion that the Claimant caused CW's death by withdrawing medication for schizophrenia and did not attend her on a regular basis. Further, he said, the Respondent accepts most of the SUI findings. In the light of his refusal to look for the missing documents identified by the Claimant, the acceptance of Dr Silva's diagnosis without even examining CW and his peremptory dismissal of the Claimant's factual inaccuracies, Mr Wright showed himself and the Respondent to be untrustworthy.

168. At the Inquest, the Coroner ordered the Respondent to find the documents which the Claimant gave evidence existed but which we find Mr Wright had not looked for. Whilst they may have been moved several times, as helpfully summarised by Mr Boyd at paragraph 47 of his submissions, they were nonetheless found within 24 hours. As Ms Grace submitted, it was only at this point that some critical comments in Mr Wright's statement became

redundant but his statement had already been submitted for reference to the Inquest. Another conclusion it is difficult to ignore is that the discovery of the documents sheds an appropriate light on criticisms of the Claimant by Dr Silva that she was being uncooperative in not producing them. Both the Claimant and her solicitors requested these documents on several occasions and we conclude that Mr Wright initiated no search for them as finding them would divert attention to the systemic issues prevalent within the Respondent. Clearly, the reputation of the Respondent was more important to him than the Claimant's professional reputation. This view also attaches the same criticism to Dr Hankin who, when asked by the Employment Judge if she knew who looked for the documents, she replied that Mr Wright was very focused on finding them and "*had a substantial team at Rampton*". She said that was her understanding "*at a distance*". We found this evidence of Dr Hankin, like much of her evidence, to be unreliable. We conclude that the Claimant was entitled to trust the Respondent and have confidence in Mr Wright producing the missing records, not only to assist her and protect her reputation, but to be as helpful to the Inquest as he should have been.

169. Whilst we accept that a SUI, Inquest and MHPS investigation have different remits, we take note of the Coroner's conclusion that she was entirely satisfied with the care given to CW by the Claimant. The remit of an MHPS investigation is to consider concerns about a doctor's conduct and capability. Dr Packham said in evidence he considered he would have been negligent had he not referred the Claimant to an MHPS investigation. It was also considered unnecessary to exclude the Claimant from Rampton. The tribunal find this somewhat confusing. If the Coroner found the Claimant's care of CW to be satisfactory, the Respondent had no reason to exclude her and relevant documents which supported the Claimant had been found, why was it necessary to continue with the MHPS?

170. To a large extent, it is probably that the answer lies in the fact that the Respondent was still under review by the CQC dating back to the death of a patient at Rampton in 2015. In other words, it was still necessary to investigate the Claimant and find she was in some way at fault to avoid any further findings in relation to systemic issues at Rampton. We note in particular that, even though the Claimant accepted her record keeping left something to be desired, she was not the only clinician there who kept paper records, yet she was the one singled out for investigation. It was more important for the Respondent to find one clinician responsible for CW's death than it was to face further scrutiny by the CQC.

171. Dr Hankin's evidence, which we have already explained we found unreliable, illustrated an ignorance of how the ward on which CW was placed was run and at no time did she see the documents found after the Coroner's order. The terms of reference of the MHPS were confusingly amended several times by Dr Packham. Ms Grace says this was to ensure there was still something to investigate in the light of the Coroner being satisfied with the Claimant's care of CW. We agree with that proposition. It was certainly confusing for Dr Mason. Mr Boyd invites us to set out what the Coroner said that should have prompted the Respondent to discontinue the MHPS. What

we know is that the Claimant's position that she conducted regular reviews of CW and kept records which were ultimately found was entirely borne out by the Coroner's verdict. The Claimant's care of CW was considered satisfactory so on what basis was there considered to be a conduct and/or capability issue? Mr Boyd points to the failure to keep records on RiO but so did other clinicians. There was an ulterior motive to continuing the MHPS.

172. Considering the failure to provide Dr Mason with the Claimant's factual inaccuracies, the missing documents and inquest notes, Mr Boyd suggests this was not corrosive of trust and confidence because the Claimant had had ample opportunity to produce documents to Dr Mason and set out in detail her factual inaccuracies. He says the issue is whether Dr Mason carried out a fair and thorough investigation under the terms of reference, which he said she did.

173. In our view, the MHPS procedure was flawed. We do not accept that Dr Mason could have carried out a fair and thorough investigation without the Claimant's factual inaccuracies and the documents lately found by the Respondent. These were documents which were in existence and held by the Respondent. In the interests of fairness and confidence in the process, they should surely have been provided to Dr Mason. Added to this is the fact that Dr Mason did not even consider the Respondent's written MHPS policy, ask for documents (why ask if you do not consider them relevant?) and failed to follow up when her request was ignored.

174. On this point, the evidence of Dr Packham and Mr Wright was inconsistent. Dr Packham said it was for Dr Mason to seek out and request all the documentation she required rather than for him to provide it in a piecemeal way. He then acknowledged that she had requested the information some 4 months before the investigation concluded, which he ignored, and said if the information had been important she should have requested it again. We found this to be a totally unreliable comment.

175. Mr Wright could not remember whether he forwarded the factual inaccuracies to Dr Mason. This was yet another example of his rather selective memory in relation to important matters. To complete the Respondent's evidence on this particular point, Dr Hankin basically said others were looking for the notes and she did not get involved.

176. Thus, it seems that the Respondent's principal witnesses on the point either had not seen the recovered documents, ignored requests to provide them, could not remember whether they provided them or thought others were looking for them. Contrast this scenario with the documents which were provided by the Respondent to the GMC following the referral to it, which included all of the handwritten records the Claimant had consistently maintained existed and were found at the Coroner's insistence.

177. In these circumstances, it would be illogical not to infer the Respondent's witnesses were motivated to offer no support or assistance to the Claimant when it suited their objective to blame her in order to deflect

attention away from systemic issues at Rampton. Their actions were entirely self-serving and amounted to a breach of trust and confidence.

178. We also consider the manner in which the Claimant's meeting on 5 April 2018 with Dr Packham was arranged, its content and the manner in which it was conducted, to amount to a fundamental breach of the implied term of trust and confidence. This was a meeting which had, in common if not legal parlance, Mr Wright's handwriting all over it. We have no hesitation in finding that the sole purpose of this meeting was to achieve the Claimant's removal from the Respondent's employment. She was hijacked by a meeting in which she was denied legal representation and threatened with a conduct hearing if she did not terminate her employment. This scenario fell just about as far away from complying with section 111A ERA provisions as one can imagine and was dreamt up, initiated and carried out with a degree of ineptitude totally unbefitting an Executive Director and Associate Medical Director of the Respondent. It was in no sense a without prejudice discussion. Once more, Dr Packham failed to take (or at least produce) any notes of the meeting. This mirrors the evidence of the Respondent's witnesses in the matter of the DMG on which, frankly, they could not agree who was a member of the group, when or where or how it met and could not produce any notes of any of the "meetings".

179. We conclude that the Claimant resigned as a result of multiple breaches of the implied term of trust and confidence. The Claimant said in evidence that the meeting of 5 April 2018 was the last straw for her, the last in a long line of breaches. Mr Wright subsequently circulated a document to the Claimant's senior colleagues stating she would be subject to a conduct hearing. His evidence that there was a mistake and on reflection it should not have been sent does not come close to limiting the damage caused to the Claimant's reputation or standing and, like much of Mr Wright's evidence, we did not accept it in any event.

180. Did the Claimant affirm any of the breaches? Here there was a significant difference in the submissions of the parties. Mr Boyd said she did affirm by waiting 2 months after 5 April 2018 meeting before resigning. This, he submits, is a sufficient delay to consider the breach affirmed. Further, even if Mr Wright's circulation of the note referring to the conduct hearing was the last straw, the Claimant still waited 3 weeks before resigning and this, too, was long enough to have affirmed the contract. Further, following ***Brown & others*** she affirmed any breaches by the simple expedient of resigning on notice.

181. Ms Grace relies on the Judgment in ***Kaur*** in her submission that the "*final act*" relied on by the Claimant revives previous breaches. At paragraph 45 of that Judgment, the Court of Appeal distinguished between a case where a series of acts which did not cross the ***Malik*** threshold is followed by one which does and a series of acts which have already crossed the threshold followed by the final act which also crosses it. She cites the comments of Underhill, LJ as noted at clause 159 above.

182. In this regard, we preferred the submission of the Claimant but this still leaves the question of the delay of two months after the 5 April 2018 meeting and the three week delay after the circulation of the "*conduct*" memo by Mr Wright. Did either delay constitute affirmation? In our view, they did not. The Claimant gave evidence that she was minded to face a conduct hearing to clear her name but decided to retire when she learned Mr Wright would be in control of that process. ***Brown & others*** is distinguishable in that the employees did not resign in response to the kind of threat made to the Claimant and there were further fundamental breaches after their resignations.

183. In this case, the Claimant's eventual decision to resign was, she felt, her only option. Even so, she continued to be harangued by Dr Packham notwithstanding the fact that she had to obtain information about her pension from her employment in Northern Ireland as well as in England. She then had to serve six months' notice of retirement on the pension fund trustees, which she did. This was an option put to her by the Respondent and she effectively had no choice. The Respondent cannot now complain that her choice of option led to an affirmation of a fundamental breach. We conclude that, in the circumstances the Claimant found herself in, her retirement on notice did not amount to an affirmation of the Respondent's repudiatory breaches of contract.

184. In concluding the constructive unfair dismissal point, we find that the Respondent behaved in a manner calculated to and likely to destroy the implied term of trust and confidence. The reason for the Claimant's resignation was the conduct of the Respondent, principally through Mr Wright, Dr Hankin and Dr Packham. That is not a potentially fair reason for dismissal, so the dismissal was unfair.

185. In relation to the victimisation claim, the Claimant says the protected act relied on was the submission of her first claim on 25 June 2019 which included discrimination claims which were subsequently withdrawn as being out of time. The claim alleging victimisation was submitted to the tribunal on 31 January 2020. The Claimant submitted this claim form without the benefit of legal advice.

186. Mr Boyd argues that no victimisation claim lies in relation to the Forensic Gender Clinic role because the Claimant raised it in her first claim (page 9) wherein she stated:

> *"I was not offered the opportunity to continue my work at the Forensic Gender Clinic within the Trust which I was assured that I would be permitted to do post retirement.*"

Accordingly, he submits her claim of detriment pre-dated the protected act of submitting her claim.

187. In our view, this approach ignores several important points. Firstly, the Claimant's claimed detriments, as pleaded in her second claim form,

continued after she had submitted it to the tribunal. The claim form sets out events in September and October 2019 when Dr Hankin ignored a letter about the role from the Claimant's husband dated 13 September 2019. She eventually replied on 16 October 2019 after a chasing letter from Dr Clark saying the role was no longer open to the Claimant. That position then changed slightly when she wrongly said the Claimant could make an application under the Retire and Return Policy. The Claimant did this but received no response for a further six months.

188. Moreover, there was not until Dr Hankin's witness statement any indication that the Claimant could not be appointed until the conduct issue had been resolved. Neither the Respondent's response to the victimisation claim nor Dr Hankin's letter to the Claimant of 6 April 2020 (page 622) makes any reference to a conduct issue. Indeed, Dr Hankin's letter makes fairly clear that the post was on hold "*although it is likely that the post will be re-advertised internally*". This is a clear indication that the Claimant would not be appointed to the Forensic Gender Clinic role notwithstanding her status as the leading expert in the field nationally. In our view, it is clear that Dr Hankin was adamant that the Claimant would not be appointed to the role and this was because she had filed a claim against the Respondent.

189. Since Dr Hankin then withdrew paragraphs 45 and 46 of her witness statement setting out that the Claimant would have to go through a conduct process before any appointment to the role, we give little weight to her evidence generally. Following ***Khan***, we find that the protected act was the real reason for the Claimant's treatment at the hands of Dr Hankin. There are clearly facts from which we could decide that section 27 EqA has been contravened and we have no confidence that the evidence of Dr Hankin shows that section 27 was not contravened for the purposes of section 136(3) EqA. Further, for the purposes of the reasoning in ***Igen***, the Claimant easily shows a prima facie case against the Respondent which cannot, through the evidence of Dr Hankin, be reasonably explained.

190. Following ***Zaiwalla***, an award of aggravated damages may be made in respect of conduct in defending proceedings. The tribunal has the power to award aggravated damages if it considers the Respondent has behaved in *"**a** highhanded, malicious, insulting or oppressive way*" as in ***Shaw***. ***Rookes*** sets out that we must consider any aggravating effect on the Claimant's injury to feelings.

191. As a result of the conduct of Mr Wright in particular, the Claimant was signed off as being unfit for work from 11 November 2016 to 9 May 2017 as a result of stress and anxiety. Given the conduct shown towards her, which gave no thought to her well-being or reputation and ignored her own comments made in her defence, we are not surprised by her absence.

192. The Respondent has displayed throughout a pattern of conduct which was self-serving of both the Respondent and senior employees in the form of Mr Wright, Dr Hankin and Dr Packham. Mr Wright, in particular, through his unreliable evidence and total lack of respect for and knowledge of the

Respondent's own policies, contrived, in our view, to use the Claimant as a scapegoat in order to avoid a prevention of future death letter from the Coroner and further intervention from the CQC. The aggravation to the Claimant's injury to feelings is clear. Accordingly, we consider an award of aggravated damages to be appropriate.

193. In conclusion, the Claimant was unfairly dismissed, victimised and is entitled to compensation. An award of aggravated damages is appropriate. Compensation will be assessed at a remedy hearing.

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Employment Judge Butler

_____

Date 15 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE