Case Number: 3303420/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Zhou	v	London North West University Healthcare NHS Trust

Heard at: Watford

On: 20-24, 27 September 2021 and, in private, 28 September 2021

Before: Employment Judge Hyams

Members: Mr D Bean
Mrs J Costley

Representation:

For the claimant: In person
For the respondent: Mr Adam Ross, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The claimant was not dismissed unfairly. His claim of unfair dismissal therefore fails and is dismissed.

2. The claimant's claim of direct discrimination because of race and/or sex, contrary to sections 13 and 39 of the Equality Act 2010, does not succeed and is dismissed.

REASONS

Introduction; the claim

1 By a claim form presented on 25 January 2019, the claimant claimed that he had been dismissed unfairly and direct discrimination because of his race and/or sex. The claimant's dismissal took effect on (the parties agreed, and we agreed with them) 29 August 2018. The period of early conciliation started on 27 November 2018 and ended on 27 December 2018. No time limit (and therefore jurisdictional) issues were raised, or arose, therefore, in regard to the claim of unfair dismissal and direct discrimination in regard to the claimant's dismissal. A time limit issue did arise, however, in regard to the rest of the claimant's claim of

direct discrimination because of race and/or sex, and we return to it in paragraph 125 below.

Application to strike out the claim and other procedural issues

2 The procedural history of the case was complicated. It was described to us in detail, with clarity and precision, by Mr Ross in an opening skeleton argument. The claimant had by the start of the hearing not sent the respondent any witness statements, including one for himself, despite Employment Judge ("EJ") Bedeau having, on 17 August 2020, ordered the parties to exchange witness statements "so as to arrive on or before 4 weeks prior to the first day of the hearing". The claimant said to us that he did not realise that he needed to send a witness statement for himself, but that was incomprehensible given that in a letter from the tribunal dated 16 September 2021, it was recorded that EJ Alliott had made the following orders.

> "The Claimant is ordered to serve his own witness statement and those of any of his witnesses on the Respondent by 12:00 (noon) on 17 September 2021.
>
> If the Claimant complies with this order, the Respondent may nevertheless apply to the Tribunal on 20 September 2021 to strike out the Claimant's claim for non compliance with the Tribunal's orders or make any other application.
>
> If the Claimant does not comply with this order, the Claimant is warned that the Tribunal will consider whether to strike out the Claimant's claim and/or consider what, if any, evidence the Claimant may give at the hearing and/or postpone the hearing and/or make a costs order against the Claimant and/or make such other orders for the conduct of the case.
>
> The parties are to attend the Tribunal at 9:30 am on 20 September 2021 for the hearing at 10:00 am. The tribunal will decide on the application for a hybrid hearing and on the application for witness summons on 20 September 2021."

3 The final part of that passage referred to the claimant's application for witness orders against (1) a former colleague of the respondent, Ms Hibo Jama, and (2) the claimant's former trade union representative, Mr Gareth Channon. The latter was a full-time official of the Royal College of Nursing, but had, said the claimant, refused to attend the hearing unless he was required to do so by a witness order.

4 We, through EJ Hyams, asked the claimant why he was seeking a witness order for Mr Channon, and he said that it was because Mr Channon could (in effect) corroborate what the claimant said about what the claimant claimed were procedural failures in the case (to which we refer below in the section under the

heading “The issues”). The claimant’s reason for a witness order against Ms Hibo was stated as being that she would be able to “counter the concerns raised by other Respondents biased witnesses which came up with statements that were directed at incriminating me” (sic).

5 By the start of the hearing, the respondent had provided the claimant with copies of its witness statements, but only with password protection and without having given him the password, so, in practical terms, it had not given the claimant its witness statements. Its reason for doing that was that it had been ordered only to exchange with, and not simply serve on, the claimant its witness statements, so that it was not in breach of the order of EJ Bedeau of 17 August 2020. That was unfortunate. The respondent could have simply sent its witness statements to the claimant and told him that he needed to send one at least for himself to the respondent in advance of the hearing. Even if that had meant that the claimant had in effect “stolen a march” on the respondent by seeing its witness statements before writing his, at least the respondent would have been standing on high ground comparatively speaking in its application for the striking out of the claim by reason of the non-compliance of the claimant with EJ Bedeau’s order of 17 August 2020. As it was, the respondent’s solicitor had failed to state in clear terms that the claimant needed to have a witness statement for himself, and had simply written (for example on 31 August 2021):

> “I have still not received your witness evidence, in accordance with the Tribunal’s Case Management Order sent to the parties on 16 September 2020. Please note that the exchange of witness statements was due to be conducted on the same day and is the final step for case preparation prior to the hearing. As such, the Respondent is placed at an ongoing prejudice whilst your witness evidence remains outstanding and we are unable to review this.”

6 In any event, after hearing oral submissions from Mr Ross in support of the application for the striking out of the claim, we concluded that

6.1 while it did not assist the claimant’s credibility that he had said to us that he did not realise that he had to put a witness statement for himself before the tribunal and of course give it to the respondent in advance of the hearing,

6.2 the interests of justice were best served by us (1) permitting the claim to continue but only on the basis that we ordered the claimant by 9.00am on the next day, 21 September 2021, to send to the respondent and the tribunal a witness statement for himself, stating not only his evidence but in what way, if any, he took issue with the content of the respondent’s witness statements, and (2) resuming the hearing at 2pm on the next day.

7 We therefore made that order and adjourned the hearing to 2pm on the next day. We also said that the respondent should without further delay, i.e. immediately, give the claimant the password to the witness statements of the respondent. Mr

Ross did that on behalf of the respondent. The claimant complied with the order that we made on 20 September 2021 to send the respondent and the tribunal a witness statement for himself at 08:59 on 21 September 2021, and we started the hearing with the parties present at 2pm on that day. The hearing had been listed by EJ Bedeau on 17 August 2020 for 10 days to determine liability only, but we had been told by the tribunal staff that it was listed only for 8 days. Unfortunately, that shorter listing had not been stated to the parties. In addition, the case had initially been listed to be heard by another judge, but he had been taken ill over the weekend of 18 and 19 September 2021, and the only judge who was available to hear it was EJ Hyams, and he was unavailable during the morning of Friday 24 September 2021 or Wednesday 29 September 2021. Further, Mr Bean was unavailable in the morning of 23 September 2021. With the parties' agreement, however, we started the liability hearing at 2pm on 21 September 2021 on the understanding that we would see whether we had enough time to hear all relevant evidence and submissions and determine liability in the time available. We did so because the issues appeared to us to be such that it might well be possible to do so. In addition, however, at the request of Mr Ross, we agreed to be prepared if necessary, i.e. if either of the claims succeeded to any extent, to decide issues relating to contributory fault and those relating to the application of the cases of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, [1988] ICR 142 and *Abbey National plc and another v Chagger* [2009] EWCA Civ 1202, [2010] ICR 397.

8 We declined to make a witness order on behalf of the claimant, and asked him to send us any correspondence from Mr Channon showing that, and if applicable why, he was refusing to give evidence for the claimant. Since Mr Channon was not employed by the respondent, we had difficulty understanding why the claimant needed a witness statement in order to be able to rely on Mr Channon's evidence. We now record that at no time during the hearing before us did the claimant put before us any correspondence from Mr Channon stating an unwillingness to attend the hearing without a witness order, and that as a result we made no order requiring Mr Channon to attend and give evidence. Also, because we could not see how Ms Hibo's evidence could assist the claimant, given the issues in the case, to which we now turn, we declined to make an order requiring her to attend to give evidence.

The issues

9 On 15 October 2019, EJ Bedeau conducted a preliminary hearing to, among other things, determine the issues. He then listed them in the document dated 23 October 2019 and sent to the parties on 6 November 2019 of which there was a copy at pages 64-71 (i.e. pages 64-71 of the hearing bundle; any reference below to a page is, unless otherwise stated, to a page of that bundle). We accepted that list with the caveat that the questions arising in the claim of unfair dismissal apart from the question whether (assuming that the reason for the claimant's dismissal was his conduct) there were reasonable grounds for the conclusion that the claimant had committed the conduct for which he was

dismissed, were all determinable by reference to the range of reasonable responses of a reasonable employer test, so that, for example, the question whether the respondent followed a fair procedure in deciding that the claimant should be dismissed had to be decided by asking whether that procedure was within, or as the case may be outside, that range. In addition, EJ Bedeau had run together the two questions of (1) the fairness of the procedure and (2) whether there were reasonable grounds for deciding that the claimant had done the things, i.e. the conduct, for which he was dismissed. The terms in which EJ Bedeau listed the issues were as follows.

"Unfair dismissal claim

5.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

5.2 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The burden of proof is neutral here, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

5.2.1 The claimant contends that particular witness statements and documents were given to him shortly before the disciplinary hearing, held on 23 August 2018, giving him little time to adequately prepare his defence to the allegations.

5.2.2 The claimant was only told the previous evening, 22 August 2018, that his witnesses were not allowed attend the disciplinary hearing because they were only going to give character evidence.

5.2.3 For a period of eight weeks, the claimant was not told that his suspension was being reviewed, as required under the respondent's disciplinary policy.

5.2.4 The claimant was not allowed to call his witnesses to the disciplinary hearing.

5.2.5 The respondent's witnesses did not give evidence in relation to the allegations, but evidence based on stereotypes and perceptions of the claimant as a well-built black male.

5.2.6 The evidence relied upon, by the respondent was inconsistent and biased against the claimant.

5.2.7 The respondent lied, stating that it gave the claimant's witnesses and its witnesses the same notice of the disciplinary hearing, namely 48 hours.

5.2.8 The respondent took 21 days to send the outcome of the disciplinary hearing to the claimant.

5.2.9 The respondent failed to respond to the claimant's grounds of appeal within 28 days, in breach of its policy.

5.2.10 The claimant was not able to call his witnesses at the appeal hearing.

5.2.11 During the appeal, the respondent relied on the negative perceptions and stereotypes given by its witnesses, of the claimant as a well-built black man.

5.2.12 The respondent did not have any evidence to support the allegation of improper conduct with a female patient.

5.2.13 Historically, the respondent raised, at different times, allegations of the claimant's improper conduct towards patients with a view to incriminating him and to dismiss him.

5.2.14 The claimant's dismissal and the appeal outcome were discriminatory based on his colour and his sex being a man.

5.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

5.4 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant committed the misconduct alleged.

5.5 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event?

<u>Direct race discrimination</u>

5.6 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010 because he is a black man, namely:

5.6.1 It relied during the disciplinary process, on statements from its witnesses replete with negative racial stereotypes and perceptions of the claimant as a black man?

5.6.2 The claimant's dismissal was an act of race discrimination.

5.7 The claimant will rely on a hypothetical white staff nurse in similar circumstances

5.8 Has the respondent treated the claimant, as alleged, less favourably than it treated or would have treated the comparators?

5.9 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, namely race?

5.10 If so, what is the respondent's explanation? Does it prove a nondiscriminatory reason for any proven treatment? It is the respondent's case that the claimant's dismissal was for a non-discriminatory reason, namely sexual impropriety with a patient, which was gross misconduct for which he was dismissed without notice.

Direct sex discrimination

5.11 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010 because of sex; namely:

5.11.1 The claimant worked in sexual health and was the only male working in that area of work. As part of his duties he tested male and female patients for sexually transmitted diseases and was the only male charge nurse working in that area. The respondent's female witnesses working in the sexual health clinic, gave evidence and said the claimant, as a male, should not be giving sexual health advice to females because of his appearance being a black man.

5.11.2 It is the claimant's case that a witness called 'CP' stated that it would be better [if] the claimant's role was performed by a woman.

5.11.3 The respondent relied on stereotypical views about men and the fact that the claimant is a black male.

5.11.4 The claimant was dismissed because of sex.

5.12 The comparator is hypothetical female charge nurse carrying [out] the same work as the claimant and, in all other respects, their circumstances are similar.

5.13 Has the respondent treated the claimant, as alleged, less favourably than it treated or would have treated the comparator?

5.14 If so, has the claimant proved primary facts from which a tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic, namely sex?

5.15 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? It is the respondent's contention that the claimant admitted having sexual contact with a patient and that such contact constituted gross misconduct. The respondent's contention is that the claimant's treatment, including his dismissal, was non-discriminatory."

The evidence before us

10 We heard oral evidence from the respondent's witnesses first. In so doing, we heard from the following witnesses, who were all employed by the respondent:

10.1 Ms Colette Horan, was is currently employed as Clinical Lead for Transformation, and who was before that employed as Senior Nurse for Quality and Clinical Standards (Community Services);

10.2 Ms Laia Blanco Ruibal, who is currently employed by the respondent as a "Band 6 Nurse" (i.e. on level 6 of the pay scale applied nationally in the National Health Service) in its Genitourinary Medicine/HIV Services Department. She had been employed by the respondent as a nurse since February 2014, and started working in sexual health as a Band 5 Nurse in 2015;

10.3 Ms Judith Mathieson, who worked for the respondent in that Department as a Band 6 Nurse via an agency between March 2017 and July 2018; and

10.4 Ms Donna Adcock, who is currently the respondent's Deputy Chief Nurse and who was the respondent's Head of Nursing for Integrated Medicine between January 2018, when she started working for the respondent, and January 2019.

11 The respondent put before us two other witness statements. One was made by Ms Barbara Beal, who determined the claimant's appeal against his dismissal, but was (we were told for the reasons stated in paragraph 104 below) unable for medical reasons to give evidence orally to us. The other was Ms Jennifer Roye, whose evidence was relevant only to the decision to suspend the claimant on 3 May 2017. Ms Roye was able to give evidence to us only in the second week of the trial, and at the end of the first week, we indicated to the claimant that Ms Roye's evidence was highly unlikely to be relevant to the fairness of his

dismissal, since his suspension occurred over 15 months before the dismissal and the fact that he was suspended was not in issue. We said, therefore, that unless the claimant sought permission to amend his claim so that he was claiming that his suspension was discriminatory, Ms Roye's evidence was unlikely to be relevant. We also pointed out that such an application would be made well out of time so that the claimant would face an uphill struggle in regard to the issue of whether the claim was within the jurisdiction of the tribunal. In the event, the claimant did not make such an application and he did not say that he wanted to cross-examine Ms Roye. She was therefore not called by the respondent to give oral evidence.

12 The claimant gave oral evidence on his own behalf. He adduced no further oral evidence on his own behalf.

13 We had before us at the start of the trial a bundle of 744 pages excluding its index. That bundle had added to it as pages 745-768 the Nursing and Midwifery Council ("NMC") code of conduct entitled "The Code – Professional standards of practice and behaviour for nurses, midwives and nursing associates", and as pages 769-776 some notes put before us by Ms Adcock, to which we refer further in detail below.

14 We heard oral evidence and submissions until 12:30 on Monday 27 September 2018, after which we deliberated in private. Having heard the above evidence and read the documents in the bundle to which we were referred, we made the findings of fact stated in paragraphs 18-104 below. Before doing so, we refer to the manner in which were required to, and did, approach the claim of direct discrimination within the meaning of section 13 of the EqA 2010.

The burden of proof in a claim of direct discrimination within the meaning of section 13 of the EqA 2010

15 In the course of determining a claim of direct discrimination within the meaning of section 13, section 136 of that Act applies. The latter provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

16 When applying that section it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because

of a protected characteristic, to take into account the respondent's evidence, but not its explanation for the treatment. In addition, where the person who did something which it is alleged was discriminatory does not give evidence, the tribunal, taking a common sense approach, has to decide whether "any positive significance should be attached to the fact that [that person] has not given evidence". Those things are clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263. The whole of that passage is material, but the most relevant parts of it for present purposes are as follows.

> "26 ... As discussed at paras 20-23 above, it had [by the time of the enactment of section 136(2) of the EqA 2010] been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case.
>
> ...
>
> 40. ... At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that, as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. In so far as the Court of Appeal in *Igen Ltd v Wong* at paras 21-22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact.
>
> 41. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw,

inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

42. There is nothing in the reasons given by the employment tribunal for its decision in this case which suggests that the tribunal thought that it was precluded as a matter of law from drawing any adverse inference from the fact that Royal Mail did not call as witnesses any of the actual decision-makers who rejected the claimant's many job applications. The position is simply that the tribunal did not draw any adverse inference from that fact. To succeed in an appeal on this ground, the claimant would accordingly need to show that, on the facts of this case, no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy.

43. Where it is said that an adverse inference ought to have been drawn from a particular matter – here the absence of evidence from the decision-makers – the first step must be to identify the precise inference(s) which allegedly should have been drawn. In their written case on this appeal counsel for the claimant identified two such inferences: (i) that the successful applicants for the jobs for which the claimant unsuccessfully applied were of a different race or ethnic origin from the claimant; and (ii) that the recruiters who rejected the claimant's applications (in all but two cases on paper without selecting him for an interview) were aware of his race when doing so.

44. On the first point, the tribunal stated in its decision that no evidence was adduced as to the race of the successful candidates and that the tribunal could not make any findings of fact about this. The tribunal did not mention that there was evidence that seven candidates who were hired were born in the UK and one in India. But I do not think that the tribunal can reasonably be criticised for not drawing any inference about the racial profile of any of the successful applicants from the fact that the decision-makers were not called as witnesses. There can be no reasonable expectation that a respondent will call someone as a witness in case that person is able to recall information that could potentially advance the claimant's case; and I can see no reason why the tribunal should have

inferred that, by not calling as witnesses any of the numerous individuals involved in making the various recruitment decisions, the respondent was seeking to withhold information about the race of successful candidates."

17 In addition, in some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

Our findings of fact

The claimant's position with the respondent

18 The claimant was employed by the respondent as a Band 5 Nurse, or staff nurse, from 3 November 2008 onwards to work at the respondent's sexual health clinic at the respondent's Northwick Park Hospital, until, on 1 December 2011, he was promoted to be a Band 6 Sister/Charge Nurse. He line managed Ms Blanco Ruibal (who referred to herself only by reference to the first of those two surnames, so we refer to her below as "Ms Blanco"), among others.

The events which led to the claimant's dismissal

The claimant's suspension

19 The claimant was suspended by Ms Roye in person on 3 May 2017, after an allegation was made of inappropriate conduct by the claimant when carrying out an intimate examination of a patient. That suspension was confirmed in the letter dated 4 May 2017 at pages 242-243. A further allegation of misconduct by the claimant was made by a patient on 12 October 2017. It is, however, not necessary to go into the detail of either of those allegations, as the claimant was not dismissed to any extent because of his conduct on either occasion. We mention them mainly because they were the subject of the investigation of Ms Horan which concerned also the alleged conduct for which the claimant was dismissed. In addition, however, we needed to mention them to explain why the claimant was suspended on 3 May 2017.

The allegation which led to the claimant's dismissal

20 The allegation which led to the claimant's dismissal was made first on 21 December 2017. It was described by Ms Blanco in the following way in her witness statement.

> '7. On 21 December 2017, I returned to clinic and overheard a patient talking to Sue Towill (Receptionist) and Hibo Jama (Healthcare Practitioner). The patient said "we need to be careful with the 15 and 16 year olds in the clinic as he had been doing this to her friends". At

> the time, I did not know she was talking about Tapiwa [i.e. the claimant]. Roubinah Nehor took the patient's history and account and then I saw the patient to take her bloods. I felt that the patient was acting quite strange, she seemed quite loud and hyper. After the consultation, Roubinah explained that the patient said that she had previously had Chlamydia and was seen by Tapiwa. She had vomited the medication and in those circumstances the advice is to call the clinic to be provided with a repeat dose. The patient said that she had contacted Tapiwa directly and he had met her outside Kenton station to re-dispense medication. At no time should anyone re-dispense medication outside of the Trust. The patient told Roubinah that Tapiwa had later tried to force her to perform oral sex.
>
> ...
>
> 9. Tapiwa called me a few days after the third allegation (made on 21 December 2017) came to light. He said that Jo McCarthy (Divisional Head of Nursing) had called and asked him to meet as soon as possible. He asked me what was going on. I said that I couldn't tell him anything. I asked if he remembered seeing the patient and whether he knew she was 18 years old. He said "Laia, I've met up with many patients from the GUM clinic". After that conversation, I blocked him from my phone and haven't had any further contact with him.'

21 There was at page 272 an email from Mr Jonathan Davies, the respondent's Deputy Chief Nurse at the time of sending it. It was dated 28 December 2017 and was sent to Ms McCarthy. In it Mr Davies wrote that he had been "asked to speak to a nurse at the NPG GUM clinic this morning who was distressed about the allegations made" about, it was clear, the claimant. The email included this paragraph:

> "During the conversation she also told me that the nurse said to her that he had met many patients outside of the clinic, I asked her to verify what she was saying and she was very clear that he said this to her. I explained that I would have to bring these issues to your attention as DHON and that she may have to provide a statement and cooperate with the Trust and Police investigation, she understood this."

22 On 29 December 2017, Ms Bharti Halai of the respondent's Human Resources ("HR") Directorate sent Mr Nicholas Win, also of that Directorate, the email at page 282, enclosing copies of five documents. The claimant's suspension which had started on 3 May 2017 had by then been ended, but the claimant was at that time absent from work on account of sickness. The five documents were

22.1 the email from Mr Davies to which we refer in the immediately preceding paragraph above;

22.2 a statement taken by Ms Nehor on 21 December 2017 from the patient about whom Ms Blanco wrote in the passage of her witness statement that we have set out in paragraph 20 above, who was referred to by the respondent as "patient 3", and to whom we accordingly refer below as such (pages 283-285);

22.3 a short statement made by Ms Jama on 21 December 2017 (page 286);

22.4 a short email written by Ms Towill on that day (page 287); and

22.5 a letter dated 29 December 2017 (pages 288-289), suspending the claimant (again).

23 The latter letter stated the reason for the claimant's suspension as follows.

> "3. On 21st December 2017, a patient walked into the GUM clinic at NPH and alleged that you:
>
> - Asked the patient for her personal contact number, without reason to do so.
>
> - You hugged the patient.
>
> - You contacted the patient on her personal mobile and arranged to meet with her outside of work.
>
> - You met the patient at Kenton Station, drove to a hotel, the patient requested to leave the hotel, on driving her back from the hotel you initiated unwarranted physical/sexual contact.
>
> 4. You contacted a colleague to request information regarding the patient who raised the concerns against you on 21st December 2017."

24 The statement taken from patient 3 by Ms Nehor was in handwriting, was dated 21 December 2017 and was in these terms.

> "I was asked by Associate Practitioner Hibo Jama to see pt no. [blanked out] who mentioned some sensitive informations re: staff member Tapiwa. I saw [blanked out] who consented verbally to tell me what have happen with S/S Tapiwa Zhou (see attach[ed] sheet). [The right hand side of the document was slightly cut off when it was scanned.] Patient wanted my email address to forward me Crime Ref No from the police. D/W Dr Kapembwa, thought it would be better if [blanked out] brings in the paperwork herself – appt on Wednesday 27th @ 10 am with myself.

I've also asked receptionist Sue Towill and AP Hibo Jama to write a statement about what was mention[ed] to them by the patient.

The lead nurse Andrew Sealy was made aware of the allegation. Advised to inform Nick Win (HR), who suggested that Jo McCarthy should be made aware. Email sent to Jo McCarthy.

Appt → for ECC

Ct [client?] → told by Tee.

Asked for your mobile number → proceed to hug [blanked out]

He called you 3 days earlier to [hand?].

Given stat dose → tattoo of scorpio[n?]
tried to kiss and hug pt

Mcdonalds – sick → Text tee.
Meet tonight → he'll pick up from Sth Kenton station & give ct Rx [repeat prescription?]

driving a black [Chrysler] car → got into car → would like to go

→ Wembley Hilton → bought 3 gin & tonics

asked [blanked out] if she wanted to stay → 10 pm request to go back to Wembley → pull

→ told no free drink; took penis out; he pushed head down for OI;

Pull back → she acting hysterically.

Drove back Sth Kenton → Messages [Dr ?] Wates [?]

Reported to police → couple of wks
→ Harrow police station".

25 Ms Jama's statement was in these terms:

"21/12/17

I was at the reception waiting notes. Patient been call to register. Patient said that she her [sic] D.O.B was wrong and was here 2/12 and see someone call T.

> Receptions replay that was more than two months ago. Patient start saying that he was creep and she put a complain thought to solicitor [sic] and solicitor trying to find his surname. No replay about the comment from the receptions or me.
>
> Pt keep changing [her] details (given 3 different surnames, 2 different address and 2 different phones). At the end patient details find.
>
> Pt notes given to Rubi Nehor and inform what the patient said.
>
> Hibo jama"

26 Ms Towill's email was in these terms (precisely):

> "Good afternoon Ruby you have asked me for a witness statement as follows.
>
> On Thursday 21/12/2017 at approx. 2.40pm I called a young lady to register clinic number [blanked out] she made a number of allegations against male nurse Tapiwa, She claimed that last time she visited the clinic he made her feel extremely Creeped out almost like he was grooming her she said we should be careful if there were any 14 or 15 year olds in the clinic, She also claimed that he had been following her and other girls in his black car and that she thought he had tampered with clinic records to gain access to her information. The young lady said she had reported all this to the police and that in was in [sic] the legal process.
>
> Susan Towill Gum clinic receptionist."

27 On 10 January 2018, Mr Sealy sent the email at page 291 to a number of recipients, reporting among other things that

> "The patient making the third allegation re-attended the clinic on 03/01/18 to give a more detailed account of her allegation. At this attendance the patient provided the clinic manager with the crime number (1900131/18). The clinic manager took a handwritten note of the allegations made by the patient."

28 That "handwritten note" was, as far as we could see, at pages 435-436. It was copied with slight truncations at the top. It appeared to consist of four pages of notepaper with handwriting on them, copied in an order which might not have been that in which they were written. They were headed (on the second of the four pages) "CAROL ANNE WILLIAMS NOTES". Taking the text in the order in which it appeared on those pages, and noting that the first part of it was probably only introductory (and included the patient's name and date of birth, although those were not clear on the copy that we had), it was this.

"21st Dec
T.

1st visit no number given

Texted 4-5 times you're beautiful

Txt call health advisor.

21st April –
- Rang back it was T.
- Dates –

CAD reference 190013/18
– DIALLO – officer
– South Harrow police station
Treatment date – 1 week after came to clinic ? date.

– Macdonalds – was sick

Txt him to say sick
T.
– Txt back – he would meet at S. Kenton station

- Drop me 5 mins near Harrow bus station –

– ? 11.15. Bus 186 towards Wealdstone from Harrow bus station.

1 more message from him
'Hope you're having a good day.'

T described by B [i.e. patient 3]
- Car – Tattoo – Scorpio on left arm.

- Children – little girl 5 or 6 yrs not i/c mother.

Showed picture –
B has reported T to the police
- Police –

B. Has a solicitor - Toussaint + Co.

– Alysa – Southall/Wembley↑

(Roubinah.nehor@nhs.net. ext 3148.) ↔ written by B.

pulled over 'drink not free'
exposed himself pushed

Txt

- CAD + Email police p

_____

Discussion [?]
Wed. 3.1.18.
NUOILL
zero

- Interviewed by Ruby Nahour – clinical manager

- Age of [?]

  - What happened & when?

- Has she told police Crime No? CAD

- L5 [?] – Ruby –

Dates/Timelines

- When what how piece together.

  – Whats app Email to Ruby's
→ Email"

29 Ms Williams was interviewed by Ms Horan, with Mr Win in attendance, on 9 February 2018. There was a copy of the note of the interview at pages 433-434. The relevant part of the notes was in these terms (precisely, i.e. complete with minor typographical errors).

> "Are you aware of the allegations that have been made about TZ?
>
> CW Yes, I attended a meeting with Ruby to support her while she spoke to the patient. I think this was the third allegation.
>
> CH Can you tell me what you thought the patient's age was?
>
> CW I don't think she was underage because of her behaviour and clarity of speech. She would be very mature if under 18 years old. There was some confusion about the date of birth. She said the right date of birth was given that it was changed on the documents. I am not sure if the process of tracking alterations is in place. I think also that the name changed. I think the paperwork is not great. I know they can use any name but we should have a trail about dates and changes and who made them.
>
> CH How did she come across?

CW Confident. There was a difference about the end of the encounter. Checking this with ruby. I think the discrepancy was that she said he gave her a lift somewhere but then said he dropped her off at a station.

NW Was the patient credible?

CW Yes she was credible but said, I'm not out to ruin anyone's career, which was a bit odd. She did seem believable. The patient said he had shown her a photo of his daughter. Ruby may have thought he'd send the picture.

NW Do you have any information about the phone number?

CW The patient said when she phoned after being sick she had been told to contact the clinic. She spoke to him.

CH Was this on his phone or a clinic phone?

CW My impression was a clinic phone. My impression was that later he texted her. There was an exchange. Her impression was he initiated it. He pulled her five drinks, gin and tonic. She said he took her in his car to a hotel.

NW Did the patient described the car?

CW Black, a big car, maybe a Chrysler. My impression it was an SUV.

CH Were there any other exchanges since then from the patient?

CW The patient said he contacted her to ask if she was alright. She said that I know I should have done this six months ago. I don't want others to go through this. Is he still here? She said, because you trust nurses. She said she spoke to her mum and she said, this is not right, you should do something. She mentioned young girls, I think she meant young girls may be patients here. I told her that he was not here currently.

NW Did the patient know him prior to this?

CW We did not ask and my impression was that this was the first time they had met in clinic. I was there really to support Ruby. There was no accusation of wrong doing in the clinic. The patient said he was friendly.

CH Did she say if there was any physical contact in the clinic eg. Comforting/hugging?

CW I don't recall. I will check if I made a note. I took notes and will see if I can find them. I think the pt father is a lawyer and she had got some

advice. I asked her what support she needed. She came across as a strong, confident woman. She was not distressed at all. There was almost a surprising lack of emotion. That's everything."

30 Ms Nehor was interviewed by Mr Win and Ms Horan on 2 February 2018. The notes of that interview were at pages 397-402. The relevant passage in those notes concerning the allegations of patient 3 was at pages 400-402. It was in large part consistent with the notes set out in paragraph 24 above.

The claimant's initial responses to that allegation

31 The claimant was first asked by the respondent formally about the allegation concerning patient 3 on 30 January 2018 when he was interviewed by Ms Horan, who was accompanied by Mr Win. The claimant was accompanied by Mr Channon. The notes of that interview were at pages 365-369. On page 367 there was this exchange:

"CH [i.e. Ms Horan] In relation to allegation 3. It is alleged you met a patient and gave medication to them while off Trust premises.

TZ [i.e. the claimant] No. Do I get to see the patient's statement?

NW [i.e. Mr Win] The allegation is that you gave a patient medication when off-site. You met the pt offsite at a Hilton hotel and bought the pt drinks and them gave her a lift home or to a station in your car. You sexually assaulted her in your car.

TZ I need to be careful how I answer the questions without seeing a statement from the pt or police. Therefore, difficult to know how and what to say. It is difficult to discuss this as it is an open allegation and it can be disclosed to police.

NW What would you need to be able to answer questions re: the 3rd allegation?

TZ I'd like to see a statement from the pt. I do want to cooperate as much as possible.

GC [i.e. Mr Channon] If the police decide not to pursue this then it will be ok to answer questions. Perhaps this could be revisited after interviewing others in the investigation as we may know if they will drop it by then.

GC: Difficulties with NMC, police and employer investigation, and that Tapiwa has to be aware of all aspects of the matter.

CH Ok."

32 The claimant had added to that record in his amended note of the interview, at pages 372-373, but in his additional text, he had said nothing more of substance in response to the allegation.

33 The claimant was next interviewed about the allegations of patient 3 on 18 May 2018. The persons present at the interview were the same as on 30 January 2018. Mr Win refused to permit the claimant to record the meeting. (As EJ Hyams said to Mr Ross during the hearing, it is difficult to understand why the respondent, or any other employer, might not want a recording of an interview or hearing to be made, but we drew no inference from the respondent's refusal to permit the claimant to make a recording because in our experience it is commonplace to refuse to permit employees to record meetings.) The respondent's notes were at pages 377-384. The same notes, with the claimant's additions, were at pages 385-396. The following passage was at pages 387-388 and was accordingly the claimant's approved note of what he said at the interview (with the claimant's additional words underlined, and his deletions shown struck through; the textual errors are original):

> "CH Have you ever asked a patient out on a date or arranged to meet them at a later date outside Trust premises?
>
> TZ No, I do not ask patients or pople I don't know out on dates or to meet them after, not unless I knew them prior and ~~from a~~ previously and we only meet or communicate by mutual agreement.
>
> NW Can you name anyone?
>
> TZ There are loads - doctors, pharmacists, people from microbiology, people externally.
>
> There are loads, so I can't name them all.
>
> CH Anyone that doesn't work in the Trust?
>
> TZ Yes, there are people I know.
>
> CH Would you be willing to provide your phone records for April 2017?
>
> NW - last time police took your phone and we said we would come back to it.
>
> TZ Same stance as before. The police probably have my phone records to piece out whatever allegations. So my part that has been investigated and it is still an open investigation. Why can you not get phone records from person making the allegation. It's the same information.
>
> TZ It is still an open investigation.

GC Can you be more specific about the date.

CH The week before and after 25/4/17

GC Could you narrow it down further?

CH/NW discuss

CH It is not possible to narrow it down more than the week before and after 25/4/17.

NW Would you be willing to provide this?

TZ No. The other person will have the record. It is personal and and has personal confidential information.

CH Do you use WhatsApp?

TZ Yes.
CH Have you ever used WhatsApp to contact a patient?

TZ Not to contact a patient I didn't know previously.

Not to contact a patient that I didn't know. But if I knew that patient, there probably has been contact both from myself and also from that individual.

CH In Allegation 3: Patient statement says you contacted them via WhatsApp

TZ If I knew their name and knew them previously, it's possible.

If I knew the person, and there had been contact by whatsapp, then there would have been that contact. There would have been an exchange of a conversation.

...

CH Have you ever been to the Hilton hotel in Wembley?

TZ Yes, I go there a lot. Just to the bar.

CH Have you ever met a patient there?

TZ . Once again, not a patient but people I know, so it may be people I know prior, then attend here as a patient, then we amymeet up socially

Yes if I know them and they may have attended.

NW Any pt that you didn't know before?

TZ No"

34 On page 391 there was this exchange recorded about whether, and if so when, the claimant would tell a colleague about seeing someone in the sexual health clinic whom the claimant knew.

"NW If you are happy and they are happy to see you, who do you mention it to?

TZ Yes, and No, it depends on the situation. I may in passing tell a colleague that I just saw someone I know

NW Do you think you should declare it in all circumstances?

TZ It's an open question. I have never been told I have to.or we as staff need to declare if someone we know comes to the department".

35 Further down the page and continuing on the following page, there was this exchange:

"CH Did you know Rebecca?

TZ Yes I know a Rebecca.

NW Did you know them as RJ or RC [full names given]?

TZ I don't know their surname.

NW Tell us about Rebecca

TZ Someone I know in public.

CH As a friend?

TZ In passing, as a friend.

CH Their age?

TZ I don't know.

CH Their age category?

TZ I don't know.

NW Do you recall when you became friends?

TZ Well over a year ago.

NW Do you still see them?

TZ I have not seen or communicated with them recently.

...

CH Going back to where we were. Rebecca, tell us where you met her for the first time.

TZ I met her locally in Harrow.

CH Have you ever met her at the Wembley Hilton?

TZ It's possible.

CH Have you met her alone?

TZ The Becca I know, I have met her with friends in passing and probably we have met ~~I could have met her~~ alone.

CH What was the nature of the relationship?

TZ Someone I know. I wouldn't classify it in any way.

CH Was it more than a friendship?

TZ Just someone I know."

36 The claimant and Mr Channon were then given copies of the documents from which we have set out the contents in paragraphs 24-28 above and asked for the claimant's response. He asked if the respondent had any more documents recording patient 3's allegations, and was told (truthfully) that the respondent had no more. Ms Horan then asked him if he would be willing to answer questions on the allegations, and the claimant said that he was not so willing. That was for the following reasons, set out at the bottom of page 393:

> "You have notes but there is more information out there with other authorities. It could get me into difficulty if information is miscommunicated or mis intepretated with other authorities. I need advice."

37 The claimant then did not say any more about the allegations of patient 3 until the disciplinary hearing after which the claimant was dismissed. We therefore now turn to the manner in which that hearing was arranged and the circumstances in which it was held.

The disciplinary hearing of 23 August 2018

38 On 9 August 2018, Ms McCarthy sent the letter at pages 346-347 to the claimant by email. The email enclosed the investigation report of Ms Horan and its appendices at pages 348-450 and informed the claimant of the three witnesses who were going to give evidence on behalf of "the investigating officer", namely Ms Nehor, Ms Williams and Ms Blanco. On page 347, this was said:

> "Any written statements and other documents to which you, or your representative, intend to refer, should be sent to Pia Krohn, Human Resources Advisor, at least seven calendar days prior to the hearing date to ensure they are circulated within reasonable time of the hearing. Documents should either be forwarded to Pia.Krohn@nhs.net or to Pia Krohn, Human Resources T Block, Northwick Park Hospital, Watford Road, Harrow, Middlesex HA1 3UJ.
>
> May I also remind you that, if you have not already done so, you need to notify me, as the Chair of the Panel, at least seven calendar days prior to the date of the hearing, of any witnesses you intend to call on the day."

39 On 17 August 2018, Mr Channon sent the email and its attachments at pages 451-472. The attachments were almost all testimonial in nature. The only one which contained anything remotely relevant to the allegation which led to the claimant's dismissal, namely about his conduct towards patient 3, was the letter dated 15 August 2018 from Mr Denver Phiri, who wrote this (page 454):

> "Tapiwa has brought to my attention the allegations levelled against him by a Rebecca who he had known for some time prior to the allegations being made in December of 2017. I can corroborate this seeing as sometime in January of 2017, Tapiwa and myself bumped into her around the Harrow Shopping Complex area. Whilst I didn't engage in their conversation it seemed to me that they were acquainted and comfortable around each other. Furthermore, I recall that Tapiwa told me sometime in April 2017 that he had met up with Rebecca for drinks. He also told me of the incidents that occurred after."

40 On 21 August 2018, at some point during the day, Ms Adcock told Mr Channon that the claimant's intended witnesses were not going to be permitted to attend and give oral evidence because they did not appear to be able to give a significant contribution, i.e. say anything directly relevant to the allegations

against the claimant. That led Mr Channon to send the email at page 485 with its attachment, consisting of a series of WhatsApp messages between the claimant and Ms Blanco from October, November and December 2017. The attachment was at pages 487-498. The email was sent at 23:32 on 22 August 2018. At 06:46 on the day of the disciplinary hearing, 23 August 2018, Mr Channon sent the email at page 486, enclosing two longer statements made by two of the persons who had previously made statements (Ms Nafula-Makusa and Mr Zungu) "as [the longer statements provided] more detailed important information that [the makers of the statements] would have spoken to had they attended". The statements were at pages 499-501. Neither of them concerned the allegations of patient 3.

41 The hearing of 23 August 2018 took all day. However, only during the morning were notes taken of what was said by the participants including, of course, the claimant. Those notes were in handwritten form at pages 502-528 and there was a transcript of them at pages 718-744. They ended at 1pm. It was particularly unfortunate that a note-taker was not present during the afternoon because that was when the claimant gave evidence to Ms Adcock and therefore when he said to the respondent for the first time what he said had happened in regard to patient 3.

42 What we did have in the bundle as it was originally put before us was a set of notes made by Mr Channon. They were at pages 529-535, but they appeared to have been written by Mr Channon in advance of the hearing, and to be his notes of what he intended to say at the hearing in support of the claimant. In those notes, the following things were said (with underlining and bold font in the original text).

42.1 "Contrary to what the investigation report concluded, TZs failure to declare when he knows a patient before seeing them is **not necessarily** a breach of the NMC code 20.6 states 'stay objective and have clear professional boundaries at all times with people in your care (including those who have been in your care in the past), their families and carers'. All other nurses do. Mbr [i.e. the member, i.e. the claimant] kept professional boundary by ensuring that care was always professional, and separate from personal life." (Page 530.)

42.2 "**Breaching professional boundaries**

NMC code is not for the employer to enforce

Nursing Times article highlights how ambiguous this clause 2.06 [sic] is. Does professional boundary mean no contact outside of work, must refuse to see a friend if they come in? Or if they come in, remain objective and keep it separate?" (Page 535.)

43 When giving evidence, i.e. during cross-examination, Ms Adcock made a number of assertions about what the claimant had said during the hearing of 23 August 2018. She did so when standing by the content of paragraphs 17 to 19 of her witness statement, which were highly material, and which we therefore now set out.

> "17. In presenting his own case, the Claimant confirmed that he had met with patient 3 outside of work for a drink. The Claimant had treated patient 3 at the clinic and advised her that if she vomited within hours of taking the medication, she would need a repeat dose and should contact the clinic. This was the appropriate course of action given the treatment prescribed. Routinely the patient would make contact with the clinic via the usual route of referral and following consultation would receive further prescription of the appropriate medication with further medical advice. The Claimant provided patient 3 with his personal contact details and after vomiting, she followed the advice she had been given and made contact on the number she had been provided with. There was nothing to suggest that the patient was aware this was not a clinic number or work related mobile. Patient 3 alleged that the Claimant made arrangements to meet up with her to give her a repeat prescription or more medication, however the Claimant disputed that he gave her any medication outside of the workplace, despite advising patient 3 to contact him directly. The Claimant admitted to meeting the patient and taking her to buy her a drink at Wembley Hilton. When asked about this the claimant confirmed that he paid for alcohol for the patient to drink, being 'unaware' of her age and without considering apparent vulnerabilities, duty of care or professional standards. The claimant stated that there were other 'punters' also buying her drinks and as he was off duty he did not consider himself to have any professional responsibility or duty of care to patient 3 as it was outside of work hours. In the interest of continuity of care, the claimant was asked what action he had taken to ensure the patient received the ongoing care and medication. Whilst he admitted meeting up with the patient having provided her with his phone number for treatment purposes, the claimant also confirmed that to his knowledge there had been no further follow up with the patient. This was a concern as the patient had followed the appropriate advice given, by a trusted professional and yet the treatment remained incomplete. The Claimant confirmed that patient 3 had displayed behaviour of a questionable nature, making gestures and suggestions of a sexual nature whilst they sat in his car. He stated that she had been completely 'stoned' on the day of the appointment and also made derogatory comments about the patient's behaviour, lifestyle and personal hygiene. When questioned on this the claimant failed to acknowledge these factors as indicators of vulnerability and without consideration to further compromising himself or the patient he

continued to buy her alcohol and remained in her company whilst she allegedly smoked Cannabis. This behaviour is is [sic] not with the standard of professional judgement or insight I would expect to be demonstrated from a registrant at this level of experience.

18. He advised that after having witnessed the patient smoke cannabis in his company, when she continued to make advances of a sexual nature, he initially declined, however he described her as persistent and stated that she forced him into a position where he relented and allowed her to perform a sexual act on him in his car. The Claimant stated was [sic] consensual. The Claimant stated that he was aware at the time that the patient had been under the influence of drugs and alcohol but did not feel the patient was vulnerable. The Claimant accepted that he did not know her age at the time. When questioned, the claimant confirmed that he was up to date with Mandatory training requirements specifically relating to child and adult safeguarding. When discussing duty of care and professional standards, the claimant referred to the NMC code of conduct and associated standards as being a grey area and stated that in his opinion, his behaviour did not constitute a breach of professional standards of conduct in this instance.

19. From my recollection, the Claimant himself made frequent references to being a 'well-built black man' during the disciplinary hearing, using this term to suggest that both female patients and staff were naturally drawn to him. The claimant also made reference to occasions where he felt he had been misjudged due to his stature and status, particularly where he did not respond to advances by those who were drawn to him."

44 Despite being told by EJ Hyams on the first day of the hearing (see paragraph 6.2 above) that he should, if he took issue with any factual assertions in the respondents' witness statements, put into his witness statement in what way he did so, the claimant put nothing in his witness statement about the content of paragraphs 17 and 18 of Ms Adcock's witness statement. He did say that he took issue with paragraph 19 of that statement, but did not say in what way he did so, except to say that he "challenge[d] ... Points 8, 10, 14 (LB never reviewed pt), 15, 19,29 D" of that statement.

45 When, during the claimant's cross-examination of Ms Adcock, EJ Hyams pointed out to him that the failure to take issue with paragraphs 17 and 18 of Ms Adcock's witness statement meant that we would be likely to accept their truth, so that he should say to Ms Adcock in cross-examination in what way, if any, he said those paragraphs were not true, the claimant took issue with a number of parts of those paragraphs. That put into sharp focus the importance of the existence or otherwise of a set of notes of what had been said by the claimant

during the afternoon of 23 August 2018, and at 16:30 on 21 September 2021 EJ Hyams had a discussion with Mr Ross about that question and asked Ms Adcock what was her understanding of the position concerning notes made of the hearing of 23 August 2018. Ms Adcock said that she thought that Ms Artry had made the notes at pages 502-528, and Ms Adcock indicated that she had based her statement on a set of notes which covered the afternoon as well as the morning of 23 August 2018. We gave Mr Ross permission to take instructions from Ms Adcock overnight about the notes on which she had relied when making her witness statement and he said that he would take instructions from the respondent about the current existence or otherwise of notes of what was said by the claimant in the afternoon of 23 August 2018.

46 At the start of the hearing on the next day, 22 September 2021, Mr Ross said that the notes at pages 502-528 had been made by Ms Aziza White, a Senior HR Adviser of the respondent, and that while Ms Artry had made some notes, her instructions were that they were only brief and that they had not survived. We, through EJ Hyams, asked Ms Adcock on what she had relied when writing paragraphs 17-19 of her witness statement, and she said that it was her "reflective notes", and that she had a very good memory, which had helped her when she wrote those notes, which she had written on Friday 24 August and at the start of the following week. Those notes were not in the bundle, and she said that she had not been asked to provide them to the respondent's solicitors. She said that they were accessible via her work computer, but they could be located only if she was at work because the final version would not be identifiable by anyone but herself. She was giving evidence via CVP from her home, so she was not able to locate and send the tribunal and the claimant the notes at that time.

47 The claimant then went through the content of paragraphs 17 to 19 of Ms Adcock's witness statement and challenged the parts with which he disagreed. One of the things that he said was that the first part of paragraph 17 was not true. Ms Adcock's response was this (as noted by EJ Hyams and tidied up for present purposes):

> "During the hearing there were inconsistencies in the information provided by the claimant and the initial statements made in the investigation. He did confirm that he treated the patient while she was in clinic and he confirmed that he gave appropriate clinical advice which was to contact the clinic if she vomited within 2 hours of taking medication and she made contact and he said he then went to see her to give her the medication. He later said he did not give it and I asked how we closed the loop on the medication and the claimant said he had not advised her to re-attend the clinic. I asked him if that was an appropriate course of action for a band 6 nurse."

48 Overnight, i.e. between 22 and 23 September 2021, Ms Adcock supplied some notes about which she was recalled to give evidence on 24 September 2021.

When doing so, she said that they were made on Friday 24 August 2018 and completed on Monday 27 August 2018. They were in fact entirely consistent with the content of her witness statement. The notes were put into the bundle as pages 769-776.

49 The claimant challenged them, including by putting it to Ms Adcock that she was lying about them and that she had written them after she knew that in particular paragraphs 17-19 of her witness statement were being challenged. Ms Adcock said that she had not made notes on 23 August 2018 and that she had not made any notes in advance of the hearing of that day, but that she did not do those things because whenever she conducted a disciplinary hearing, she found it best to make no notes and instead to concentrate on what was being said and the issues in hand. She said that she had had a very clear memory of what the claimant had said on 23 August 2018 because she was shocked by what he had said then, because of what she regarded as a series of serious breaches of professional boundaries by him.

50 Before we state our conclusions on the issues of (1) the accuracy and origin of the notes, and (2) the reasons of Ms Adcock for determining that the claimant should be dismissed, we need to refer to the documents which were in the bundle (and whose provenance was not in issue, i.e. because they were accepted by the claimant to be what they purported to be) which related to the claimant's appeal against the decision to dismiss him. Those documents were (1) the claimant's own documents sent to Ms Beal on 26 November 2018 in support of his appeal (pages 555-599), (2) Ms Adcock's statement in response to that appeal (pages 604-607), and (3) the notes of the appeal hearing (there being some notes of the whole of the appeal hearing in the bundle at pages 654-665).

51 The claimant's statement in support of his appeal was at pages 558-570. At page 559, the claimant said this:

> "I accept the conclusion in relation to the third allegation insofar as I had sexual contact with a person who had some days previously attended the clinic as a patient."

52 He then said this:

> "However, I knew this person prior to her attending the clinic. I submitted witness statements that confirmed others had witnessed me talking to the complainant outside of work and prior to her coming to the clinic. I also requested within the policy timescales that one of the witnesses attend the hearing to give evidence along these lines."

53 In fact, the claimant had put before Ms Adcock only one statement from anyone stating that he knew patient 3 before his admitted sexual contact with her: Mr Phiri (from whose letter we have set out an extract in paragraph 39 above).

54 Lower down on page 559, the claimant wrote this (the underlining and bold font being in the original):

> "Additionally, there was no evidence that I had sexual contact with the complainant without consent. The complainant's statement to the Trust states there was **no** sexual contact. However, I was completely open and honest in the hearing in explaining what occurred during that incident, and admitted that there was sexual contact that was consensual. I disclosed this in accordance with the NMC code of practice and in order to be transparent with the panel. I know that the panel then went on to consider the ability of the complainant to give consent due to the apparent taking of alcohol and/or marijuana, which I understand, however as explained in the hearing I believed the patient was able to give informed consent. Whilst the patient said she wanted to stop the car to smoke marijuana, I do not know how much marijuana was in the cigarette or indeed if it was just tobacco. (To note, I did not say that the complainant had told me she was 'stoned' on the day of the alleged incident as the outcome letter states, but said the complainant told me she was 'stoned' on the day she visited the clinic for the appointment.) All I know is that the complainant did not seem or act any differently before and after she smoked and at the time I did not think she was impaired in order to not be able to give consent. If there were concerns about her ability to have given consent, considering the seriousness of the accusations and the ramifications on my career, a reasonable investigation involving contacting the complainant to investigate this further should be undertaken before reaching this conclusion."

55 In fact, there was no statement from patient 3 that there had been "no sexual contact".

56 On page 562, the claimant wrote this:

> "I admit to having sexual contact with consent with a person who some days prior had visited the GUM clinic but whom I knew personally beforehand, and I did not deny this in the hearing.
>
> In relation to the 3rd allegation, I have reflected on the breach of professional boundaries and my position. Should I be faced with this situation again, I will not engage in any personal relationship with a person I know who attends the clinic and I see them in a professional capacity, and I will ask a colleague to see a person who attends the clinic if I know them personally from outside of work. I have learnt a lot from this

> experience, especially with the nature of work that I am engaged in. I am also aware of the impact that these allegations can have on the reputation of the Trust. I would like to apologise for this lapse in professional judgment and assure the Trust that this will never happen again. I would appreciate the opportunity to explain this in further detail at the appeal, as unfortunately I am not sure if I properly showed this to the chair in the original hearing due to it being very stressful for me and complicated."

57 Those passages were in ordinary case, i.e. lower case with capital letters in appropriate places. At pages 567-569 there was a long passage in capitals, which was apparently written by the claimant himself (so that it was at least possible that the part in lower case was written on his behalf and approved by him). On page 568, writing about patient 3, the claimant had written (sic):

> "THEY ARE BITTER THAT NOTHING WOWRKED OUT BETWEEN US ALSO THEY HAVE BEEN TALKING TO PEOPLE ABOUT MY SITUATION AND ARE BEING MALECIOUS TO GET BACK AT ME
>
> A KEY WTINESS WHO CAN PROVE THAT PERSON WAS KNOWN TO ME WAS DENIED."

58 At pages 556-557 there was an extract from the claimant's bank statements showing that on 28 April 2017, he had spent at the Hilton Hotel £25,74, £24,64 and £24.64. At page 567, there was this passage (sic):

> "• BANK STEMENT TO PROVE WHEN WE MET.
>
> it can be noted from the bank statement that I only used my card for on 3 episodes for drinks, not 5 drinks as stated by the person and also that the person was met on a different day, not on the same day they attended the clinic, as the person states."

59 Ms Adcock said that the notes that she had made on 24 and 27 August 2018 were made because she knew that the claimant's conduct would be considered by the NMC and probably an employment tribunal, and she wanted to create as close to the time as possible a full record of what had happened and her thoughts about what had happened at the hearing of 23 August 2018. She said that she had had other things to do on both days, and that she had written the notes when she was able to make time to do so.

60 We noted in particular the following passage, on pages 772-773 (the passages in italics being, as Ms Adcock told us, her reflections on, and not records of, what was said at the hearing):

"• Employee asked to provide account of events – went to hotel in Wembley, bought patient drinks. How many? Only 3 – does not consider this to be inappropriate as it was outside of work.
- As a trained, experienced nurse did employee not consider patients vulnerabilities?
  Employee did not consider patient vulnerable.
- Employee confirms that he is up to date with safeguarding training.
- Employee challenged on buying ETOH [i.e. alcohol; that was explained to us by Ms Adcock] for 'patient' – also confirms he does not know her age.
- Referenced other 'punters' buying her drinks – not just me. Employee was asked – was patient intoxicated – answered I do not know – I bought her three drinks. Explained that others are not present and they have not being asked to provide account of events.
  Reinforced the rationale for questions – professional – (i) Arranging to meet patient outside of work, (ii) Buying ETOH and (iii) having a sexual encounter with patient = breach of professional standards. Accountability.
- Employee asked to define the term 'other punters' – outlined other people buying drinks for the patient, in the expectation they would receive 'something' in return.
- Employee advised he offered the patient a lift home. States he did not offer hotel room as suggested in patients statement. Discussion on this – he regularly gives people lifts, friends colleagues etc. That would explain how she would know what type of car he drives.
- Employee stated that when in the car the patient made advances to him and asked him to stop the car as she wanted to smoke cannabis. He states he pulled over on three occasions as he was distracted by her behaviours and did not want her smoking in his car.
- He stopped the car, allowed the patient to step outside of the vehicle to smoke cannabis (Marijuana). He states he was frustrated because he wanted to get home, though did not drive away once she was outside of the vehicle.
- Employee stated patient was insistent and persisted in making advances towards him whilst in his vehicle on the way to the train station, where he intended to drop her off. Description of events - She had placed her feet on the dashboard and was making suggestive movements, exposing and pleasuring herself. She did not make physical contact with him at this point but was verbally insistent that he reciprocate.
- Employee states that when patients advances were not reciprocated, she became upset. Employee was asked – what did you do at this point – response received – I was worried she might make trouble for me.

- Employee asked what do you mean by this; please expand – 'I am in a relationship with someone, I did not want the patient making trouble for me, telling my girlfriend I did things, when I didn't'.
- Employee suggests that given her approach he felt very uncomfortable and stated the patient was forcing herself upon him putting him into a very difficult position. Question – are you suggesting the patient forced herself on you - assaulted you in your vehicle? No but she was very persuasive and was upset because she felt rejected by me.
- Employee asked, did you report this or refer to this in your police statement? No, I did not.
- Employee states that 'She (the patient) persisted with her approach and eventually he relented' allowing her to perform oral sex on him, because he wanted to get home.
- Employee asked to confirm – the sexual act that took place – oral sex performed by the patient on the employee.
- Employee asked – was force used by either party – response – no this was a consensual act.
- *Note – confirmed sexual contact between patient and employee (RN) having arranged to meet in a professional capacity.*
- Discussion took place on how sexual contact might be defined; employee and representative arguing the point that oral sex would not constitute a sexual encounter as it was not penetrative.
- *Note: uncertainty around whether the employee and representative consider this mitigation – non penetrative sexual encounter – does not constitute sexual contact with patient?*
  Semantics.
- *Consideration – not posed to employee; would encounter have taken a penetrative approach, had he not been aware of the patients clinical diagnosis?*
- Following the encounter, the employee stated he dropped patient off at station to catch train home- it was late at night.
- *Note – inconsistencies within responses. Employee seems agitated. Some interruption from representative, speaking on behalf of employee at times creating confusion (is this intentional?).*
- Summary responses were heard from both management and employee representatives.
- Within employee response the representative confirmed the sexual encounter had taken place and reaffirmed that in their opinion this was not a breach of professional standards as the event took place outside of working hours and therefore the employee could not be considered to be working in a professional capacity."

61 Before us, when giving evidence (and all of the things that we record in this paragraph and paragraphs 62-73 below were said by the claimant when being cross-examined or asked questions by us) the claimant admitted to referring in the hearing before Ms Adcock to there being "other punters" buying patient three

drinks. However, he denied saying that they were punters because they were expecting something in return. He said that he did not know how many drinks the "other punters" bought for patient 3, but then he said that he bought only three drinks, not three rounds of drinks, so that he bought three drinks in total for him and patient 3. The claimant said (as noted by EJ Hyams; all of the statements of what was said by the claimant in this paragraph and the following paragraphs below were drawn from EJ Hyams' notes and in some cases tidied up): "I had two so she had one from me and she had some from other people in the bar." That was, as Mr Ross submitted to us, very difficult to believe given that the claimant had spent over £24 on three occasions during the evening. The claimant said too in response to the risk that patient 3 was intoxicated that "it was not like she spent hours with other punters and came back. We were there for two hours and left to go home."

62 When asked by EJ Hyams to state precisely what he said happened in the evening when he (the claimant) took patient 3 to the Hilton Hotel, the claimant said this:

> "In the car, she said she wanted to stay over for the night. I said I had to go to work for the next day. She became upset and said she was expecting spending the night together. At this stage I was [at this point the claimant paused]; once I had seen her behaviour in terms of the fact that she wanted to smoke marijuana; that turned the whole evening off for me. She did not take a pill that night but the whole conversation about drug use put me off this person. I wanted to go home. She could sense that I was being a bit distant. She became tearful and felt rejected that I did not want to pursue anything with her. We stopped by Kenton station. It was closed. I drove to the next station which was Harrow on the Hill. She decided to put her feet up on the dashboard and pleasured herself saying this was potentially what I could have. I was not happy with what was going on my car and at Harrow I stopped and said I needed to get home. She cried and said I was dumping her in the street. I offered her money to get her to wherever she needed to go, and she said she needed to go to South London. We were in Harrow and I said I would get her a taxi as I needed to go home. At this point she described herself as being there for me and expecting things to go further and that she knew about my partner; she knew about the case and threatened to tell my employer if I did not engage with her; to tell my employer about the fact that I was in a relationship with her. In the end we drove from Harrow to another station, which was Hatch End, where she was saying she was not getting out of the car, and I said "What would it take for you to go?" and I was frustrated. I said I had to get home as it was late. And then she said if she performed oral sex on me she would go; she wanted some kind of sexual contact. And unfortunately, selfishly, regrettably, I allowed her to do it, well regrettably, I crumbled and allowed her to do so; and after she had done it she came out and went to the station and left."

63 It was put to the claimant that that account was new. He denied that and said that it was stated to Ms Adcock at the disciplinary hearing.

64 Later on when giving oral evidence, the claimant denied being asked during the disciplinary hearing whether force was used by either party, or about how sexual contact might be defined, and he said that he "did not recall" whether Mr Channon said that it was not a sexual encounter as what occurred was not penetrative.

65 The claimant also denied saying that it was not a breach of professional standards to see patient 3 in the manner in which he admitted seeing her as the encounter took place outside working hours. He said too that he now knew that "any contact with a patient is a breach" of the NMC's code of conduct. He also said that he now acknowledged that it was a breach of that code to go to a bar with patient 3 and there to buy drinks for her. As for the sexual contact that occurred, he said that he had never been in a situation like it before and "hence I was frustrated and I just gave in".

66 When asked by Mr Ross whether he accepted that he (the claimant) had not shown regret to Ms Adcock at boundaries being breached, the claimant said that he did not accept that and that he had shown such regret.

67 Mr Bean asked the claimant this question:

> "When giving evidence you stated that patient 3 pressurised you by threatening to tell your partner and your employer; you have also given evidence that you were seeing patient 3 in a non-work capacity; so why were you concerned about what she was going to say to your employer if it had nothing to do with your work?"

68 The claimant answered:

> "As I had confided in patient 3 about the other issues I was going through so if she made further allegations against me that would put me in a compromising situation."

69 When asked by EJ Hyams why he had said that, the claimant said:

> "I already had 2 allegations of sexual assault. So I thought she would make up an allegation."

70 When giving evidence to us, the claimant denied saying to Ms Adcock that he did not know the age of patient 3. He said that she had told him that she was in her 20s and that he had said that to Ms Adcock.

71 When asked by EJ Hyams whether he had had any kind of sexual contact with patient 3 before picking her up from South Kenton station and taking her to the Wembley Hilton, the claimant equivocated. He said that it depended on what you meant by "sexual".

72 When EJ Hyams asked the claimant about the exchange set out in paragraph 33 above and whether he was willing to make available to the respondent his mobile telephone, the claimant said that the police had not given it back to him. EJ Hyams said that he did not believe that, since the police would have been obliged by the Police (Property) Act to return it, and that as far as he was aware from his professional and judicial experience the police usually returned mobile telephones, the claimant said that he had had his mobile telephone returned to him by the police but the information on it had been removed.

73 Mr Bean asked Ms Adcock whether by simply meeting up with patient 3 after he had seen her in the sexual health clinic, the claimant had breached professional boundaries. In response, Ms Adcock said this:

> "Just meeting with a patient outside of the professional setting was inappropriate. Buying alcoholic drinks for someone you know as a patient when you have met them as a nurse is a breach of professional boundaries; it is highly inappropriate."

74 We accepted Ms Adcock's evidence in that regard, in so far as it was, we concluded, a genuine reflection of what she genuinely and sincerely believed. However, that was not Ms Adcock's stated reason in the management position statement made for the purposes of the appeal hearing (and reiterated in substance by Ms Adcock on a number of occasions before us), which was at page 607 and was this:

> "Fundamentally it is clear and has been confirmed by Tapiwa Zhou that sexual activity took place between himself and a patient of the Trust. Irrespective of whether this was consensual or not, this is in breach of trust policy and procedures as well a breach of the NMC code of conduct, both of which are considered Gross Misconduct."

75 The claimant acknowledged (by the insertion of the words "sexual health is a very sensitive health care environment" in the record of his interview, at page 391) by implication that patients who attend a sexual health clinic for treatment are vulnerable. Ms Adcock, in oral evidence to us, said that she considered every patient who attended a sexual health clinic to be vulnerable.

76 When weighing up the evidence of Ms Adcock about the notes at pages 769-776 and whether we accepted that they were made as she said, namely on 24 and 27 August 2018, and whether they were accurate, we could see that many of the things that the claimant said as noted by us were corroborated by those

notes (although of course not all of those things were so corroborated, as the claimant denied saying a number of the things recorded in the notes). In addition, we found what the claimant said (not as recorded by Ms Adcock) to be in the following respects inconsistent internally or with the documents which he himself had written or were written by Mr Channon on his behalf.

76.1 The claimant's case in the disciplinary hearing was evidently (see paragraphs 33 and 42 above; see also the penultimate paragraph in the passage from the dismissal letter set out in paragraph 92 below) and on appeal (see paragraphs 51-57 above) to the effect that it was not a breach of professional boundaries to see patient 3 at the Hilton Hotel socially and buy her drinks, as he was not at work or seeing her in a professional capacity. Now, he (1) (see paragraph 65 above) denied asserting there was no breach of professional boundaries and (2) (see paragraph 66 above) said that he had expressed regret to Ms Adcock for breaching professional boundaries. However, even that was inconsistent with his reflections set out in paragraph 56 above in the statement of his reasons for appealing, which rather suggested a change of position from that which he took in the disciplinary hearing before Ms Adcock.

76.2 Despite saying (see paragraph 62 above) that patient 3 had pressurised him into sexual contact, the claimant stated (as recorded in paragraphs 54 and 56) that the contact was consensual.

76.3 Despite saying to us (as recorded in paragraph 70 above) that he had said to Ms Adcock that patient 3 was in her 20s, the claimant had initially said to Ms Horan, as recorded in the note set out in paragraph 35 above that the claimant had evidently approved, that he did not know the patient's age when he went with her to Wembley Hilton.

76.4 The claimant's equivocal response to EJ Hyams' question about prior sexual contact with patient 3 recorded in paragraph 71 above was at odds with his statement of his prior relationship with patient 3 made to Ms Horan, as set out in paragraph 35 above. There, he said that she was "Just someone I know."

77 In addition, we found the claimant's evidence about the number of drinks that he had bought for the claimant (recorded in paragraph 61 above) to be markedly inconsistent. In addition, we could not understand the use of the term "other punters" unless it was used by the claimant without realising its implications, namely that he and other persons (in fact, it appears, men) in the bar at the Hilton Hotel were buying drinks in the expectation that they would receive some sort of sexual contact in return. We also thought that £75.02 was quite a lot of money to spend on drinks in one evening for a person in receipt of the claimant's salary (his net monthly take-home pay was stated in the ET1 on page 6 to be £2,689). We also thought that it was unlikely that that £75.02 bought only

(as the claimant asserted to us as we record in paragraph 61 above) three drinks.

78 Furthermore, the claimant refused without giving any apparently good reason why to let the respondent see his mobile telephone or to give the respondent any mobile telephone records: see paragraph 33 above. He then (see paragraph 72 above) first said that the police had retained the telephone and then that they had returned it but without any information on it. It was difficult to believe that the police would have returned the telephone with no information on it, but irrespective of that factor, the claimant's evidence about his mobile telephone was inconsistent and his unwillingness to disclose the documents on it (which of course included text and WhatsApp messages) was inexplicable unless he realised that the documents would not help his case.

79 In contrast, Ms Adcock's oral evidence about what had happened at the disciplinary hearing was clear and consistent. In itself that was not determinative, and was even on one view irrelevant, but it was one factor which we saw as being relevant in deciding whose evidence to prefer about what had been said at the disciplinary hearing.

80 In addition, Ms Adcock's evidence that (see paragraph 49 above) she was shocked by what she had heard about the claimant's conduct was consistent with the evidence to which we refer in paragraphs 73 to 75 above and with what she said in paragraph 17 of her witness statement, which we have set out in paragraph 43 above.

81 A further factor that we weighed in the balance was that (see paragraph 86 below) we accepted Ms Adcock's evidence (to the extent that it differed from that of the claimant) about the time that she spent explaining to the claimant on 29 August 2018 why she had decided that he had to be dismissed. That was one and a half to two hours. We concluded that it took Ms Adcock that long because she was going through her conclusions, and if there was a document recording them, then it had to be the notes which were now in the bundle at pages 769-776. That was because the decision letter was (see paragraph 89 below) not yet produced. We did not hear any evidence from Ms Adcock about who precisely had written the letter, so it could have been Ms Artry. Ms Adcock did say to us that Ms Artry's explanation at the appeal hearing (recorded on pages 663-664, to which we refer further in paragraph 91 below) of the mistaken order of the paragraphs in the letter was accurate, and the fact that Ms Artry gave the explanation at the appeal hearing suggested that she had written the letter and Ms Adcock had simply signed it. In fact, the letter was first sent to the claimant by Ms Artry in unsigned form (see paragraph 89 below), which supported the conclusion that the letter was written by Ms Artry. If that was correct, then that reinforced the conclusion that Ms Adcock's reflective notes at pages 769-776 were the basis for her oral reasons given to the claimant on 29 August 2018 for his dismissal.

82 After weighing up carefully all of the above factors, we came to the conclusion that the document of Ms Adcock at pages 769-776 was

82.1 as she said to us, written on 24 and 27 August 2018, so that it was as far as the hearing of 23 August 2018 was concerned a reasonably contemporaneous document, and

82.2 an accurate record of what the claimant had said at the disciplinary hearing on 23 August 2018.

The claimant's dismissal

83 Ms Adcock informed the claimant in person of the reasons for his dismissal. She did so on 29 August 2018. It was her evidence that she spent between one and a half and two hours doing so. The claimant's evidence on this was given in cross-examination only (he did not deal with it in any written document, including his witness statement) and was that it was less than that, but when first asked about the event he was unable to recall it. He was then able to remember that he "did get the outcome" and was "told about the right to appeal", but said that he was "confused as it was a long time ago". He was unable to say precisely how long it took for Ms Adcock to tell him her reasons for deciding that he should be dismissed.

84 Ms Adcock was, however, sure that she spent over an hour and a half telling the claimant her reasons for deciding that he should be dismissed. In the notes of the hearing of the claimant's appeal against his dismissal, to which we refer further below and which took place on 17 January 2019, this was recorded (on page 663; CA is Ms Artry; DA is Ms Adcock; OME is Ms Obi Maduako-Ezeanyika, who was listed on page 654 as being "Support to the chair", and was shown as being the respondent's "Assistant Director of OD & Learning"; GC is Mr Channing):

"DA: The over riding elements [sic] was the sexual contact with the patient.

CA: Prior to the outcome letter we had an in depth conversation on the day. The wording could have been different.

A formal meeting took place on 29 Aug. We had an in depth discussion with TZ and explained how we came to our decision.

OME: Who is we?

CA: Donna made the decision and we discussed the notes taken.

DA: There were a number of points we were asked to clarify.

GC: At the further meeting we were told confidentially was upheld and we were told it would be in the outcome letter. Was a decision made initially and then did you use the details to make your decision after the meeting?

DA: The decision made was based on the sexual contact with the patient."

85 That passage was much closer to the time of the meeting of 29 August 2018 than the hearing before us, and the passage shows that Ms Artry referred to "an in depth discussion with [the claimant during which she and Ms Adcock] explained how [they] came to [their] decision", although she then corrected herself and made it clear that it was Ms Adcock's decision alone. Certainly, neither the claimant nor Mr Channing is recorded in the notes as having objected that the meeting was only a short one, and Mr Channing's reference to "the details" in the penultimate entry in that passage is consistent with the details for the decision having been communicated during the meeting of 29 August 2018.

86 Given the claimant's poor recall of the event, and given the factors to which we refer in the preceding paragraph above, we preferred Ms Adcock's evidence on this issue. We accepted that she spent over an hour and a half explaining in detail the reasons for her decision that the claimant should be dismissed.

87 Given our conclusion stated in paragraph 82 above about the notes at pages 769-776, we accepted also Ms Adcock's evidence in paragraphs 21-24 of her witness statement about the reasons for her decision to dismiss the claimant. That in turn was because the content of Ms Adcock's witness statement reflected the notes at pages 769-776. Paragraphs 23 and 24 of her witness statement were the key parts of it relating to the reasons for the claimant's dismissal, and they were as follows.

"23. I considered potential sanctions but found the Claimant's misconduct so serious as to amount to gross misconduct, warranting dismissal without notice. I did not consider that a final written warning would address the concerns I had about the Claimant's conduct. Upon his own admission the claimant failed to ensure continuity of care via the appropriate pathway for the patient and despite being in a position of trust demonstrated a blatant disregard for the patient's wellbeing, failing to uphold professional standards or safeguard the patient's interests.

24. Paragraph 20.6 of the NMC Code of Conduct states that professionals must 'stay objective and have clear professional boundaries at all

> times with people in [their] care (including those who have been in [their] care in the past), their families and carers'. Patient 3 had made contact with the Claimant in the guise of a patient, following the instructions he had provided. The Claimant was acting in his professional capacity at the time and should have maintained professional boundaries. This particular service treats many young and vulnerable individuals. Often it can take these individuals a lot of courage to walk through the door and therefore they are very trusting of our healthcare professionals. It is therefore even more important that these professional boundaries are maintained. I felt that the Claimant failed to display any insight into his actions and the risk they created in respect of patient safety and professional boundaries."

88 We then considered what Ms Adcock said in paragraph 25 of her witness statement, which was this:

> "My decision to dismiss the Claimant was solely based on the facts of the case and was in no way influenced by his sex or race. The comments made by the witnesses about the Claimant's character, behaviour or perception did not form part of my decision making. Essentially I was of the view that, whatever the Claimant's personality traits were, they were not specific to the circumstances surrounding allegation 3. I made my decision based on the evidence supporting allegation 3 and on the Claimant's own admission. Had a female individual of the same or other racial background been the subject of exactly the same allegations and facts, I would have reached entirely the same outcome."

89 The only thing in the circumstances from which the inference that the claimant's race or sex might have had an influence on Ms Adcock's decision that the claimant should be dismissed might be drawn was the part of the letter stating the reasons for the claimant's dismissal which we have set out in paragraph 92 below. That letter was in the name of Ms Adcock but was first sent by Ms Artry to Mr Channon (only; i.e. it appeared that it was not copied to the claimant) by email first without a signature on it. The email enclosing the letter was at pages 547-548, was sent on 21 September 2018, and was in these terms:

> "Dear Gareth,
>
> Please accept my apologies for the delay in receiving this important information. Unfortunately there has been some miscommunication which has resulted in the delay in response.
>
> Please see attached outcome letter following the hearing which took place on 23rd August 2018 with outcome verbally communicated on 29th August 2018.

This is unsigned however Donna will provide you with a signed copy via post in due course."

90 In fact, the copy in the bundle was not signed. It was at pages 540-544. The passage in the letter stating the main factual determination which formed the basis for the claimant's dismissal was this (on page 542; the quotation is precise, so that for example the sequence "that she like 'pills ' and marijuana" is precisely as it was in the original):

"Allegation 3: Tapiwa was reluctant to fully comment during the course of the investigation following receipt of the patient statement and further confirmed that he would need to seek legal guidance in respect of the allegation. No further information was provided by Tapiwa Zhou until the hearing.

Tapiwa confirmed that he had met the patient outside of work for a drink. Tapiwa stated that other 'punters' bought a drink for the young lady also and upon leaving the hotel suggestions and gestures were made towards him in respect of sexual acts which were refused. Tapiwa confirmed that the patient made reference to liking Marijuana and he stopped to allow her to smoke this outside his car. From then it is confirmed that at some point in the continuation of their journey Tapiwa stopped the car and engaged in what he described as a consensual sexual act.

Despite informing the panel that the patient had informed him that she was 'completely stoned' on the day of the alleged incident and that she like 'pills ' and marijuana as well as the fact that she had consumed alcohol paid for by Tapiwa and others in the hotel bar, Tapiwa did not feel the patient was in anyway vulnerable and this was despite being professionally trained to recognise the signs of patient ability to give consent.

The panel were concerned that this patient had been confirmed to have consumed alcohol, taken mind altering drugs and also demonstrated behaviours which would indicate inability to deal with rejection from Tapiwa. Despite these clear warning signs that consent may be compromised Tapiwa allowed the patient to perform a sexual act on him.

The panel were aware of behaviours exhibited during the hearing which were concerning. Despite indicated knowledge and understanding of confidentiality Tapiwa disclosed confidential information in respect of his colleague in the form of a direct question regarding clinic attendance. It was stated by the witness that Tapiwa informed them during a sickness absence meeting that he could say A or B against her and she would be unable to do anything about it. The witness stated that this made them feel uncomfortable. It was noted that this was the first time they had operated in an official capacity with Tapiwa.

During the hearing a witness stated that whilst there was general banter in which all staff engaged there was one particular incident where she felt Tapiwa had not kept the patient in mind. It was stated that he had comment on a case where the patient had stated they had been sexually assaulted. It is claimed Tapiwa stated that the patient 'just fought with her boyfriend and wanted to make sure she was clean for the next one'. It was stated that the witness was unable to speak with Tapiwa for a week as she was so angry. It was stated that by Tapiwa that this was taken out of context and it was merely banter.

Based on the information above this allegation was substantiated."

91 At pages 663-664, which was part of the notes of the appeal hearing to which we return below, there was this exchange ("BB" being Ms Beal):

"OME: Referring to the outcome letter it states "Based on the information above the allegation was substantiated". Was the paragraph above this line the one that made your decision?

CA: The information above is based on allegation 3. The outcome letter outlines everything that took place in the hearing. The banter is not in relation to allegations 3.

Para 4 ends the conclusion for allegation 3. Paragraph 5, 6 form part of the hearing. The last line "Based on the information above this allegation was substantiated" should have been moved up and put under paragraph 4. This does not form the appeals panel decision today.

DA: I apologise for this.

BB: Can this be summarised in the notes."

92 On page 543 there was this passage, under the heading "Mitigation".

"During the hearing Tapiwa and his representative made reference to the credibility of the patient based on her smell, behaviour, loudness and drug use, it was also mentioned that her lack of emotion led to questionable credibility. There did not appear to be anything this patient could say that would be considered 'true' by Tapiwa and his representative based on the above factors.

Tapiwa suggested that his interaction could be argued as it was his opinion that the patient was no longer a patient at that point. It was however

clarified that Tapiwa still had a duty of care and was a representative of the Trust and therefore there is an expectation that he will act accordingly.

Gareth Channon, RON Rep stated that the #me too movement may have some part to play in the allegations made and that these individuals wanted to be a part of that movement. The panel were in agreement that the #metoo movement had empowered individuals to speak up in situations where they were most vulnerable.

Gareth Channon, RCN Rep further stated that the NMC code was not for the employer to enforce. The code could be interpreted in a number of ways and what had transpired was not necessarily a breach of point 20.6 from his perspective. It was stated that an article in the Nursing Times indicated the ambiguity of this clause and queried whether professional boundaries mean no contact outside of work. It was clarified by the Chair that the NMC code forms a part of Tapiwa's contract expectations. Whilst it is not for the Trust to enforce this code it is expected that staff will adhere to their professional codes and standards within the workplace.

Credibility of the witness was also questioned and this was based on reference to information provided to a patient. It was felt that as a large black male this would not be appreciated by the patient. Tapiwa felt that this was a discriminatory opinion based on the fact that he was a large, black male and had nothing to do with his knowledge and skill. The witness clarified that the patient was being advised about sexual difficulties she had faced with her husband who was described by the patient as a large male. The witness further clarified that they are trained to provide information in a manner which is mindful of the situation and she was of the view that it would be better received from a female in that particular situation."

93 We could not understand why the final paragraph was in the decision letter. Ms Adcock explained it in paragraph 29(d) of her witness statement in this way:

"d) Racial and gender discrimination

I referred to a discussion during the hearing in which the Claimant had interacted with a patient about sexual difficulties she had experienced with her husband who was a large male. Ms Ruibal-Blanco suggested that as a large black man it may not have been appropriate for him to give this advice and that it may have been easier for the patient to receive the information and advice from someone who would be less representative of the situation. In the context of the GUM clinic, it is essential for staff to be mindful of sensitive situations and act accordingly. I felt that Ms Ruibal-Blanco had explained her comment during the hearing and I accepted that

> the gender and race should not apply in this instance. The comment did not however form any part of my decision making."

94 We ourselves, through EJ Hyams, questioned Ms Blanco on what she had meant by the comment about the claimant being "a large black man" and she explained it in the same way as she explained it to Ms Adcock as Ms Adcock described in paragraph 29(d) of her witness statement. We remained unable to understand the rationale for referring to the claimant as large black man: his sex and race had nothing to do with the advice given to the patient. The comment was in the bundle at page 405, and was in this passage:

> "On the day he saw the patient TZ came to the lab to see me. It was a sunny day around 4.00 PM. TZ said these young people don't know what they're doing. This patient I'm seeing is very young, she says she is very dry when she has sex. I told her she needs to have longer foreplay to make sure she is wet so she can enjoy sex. I remember this because in the previous week we were talking in the kitchen. I was saying the size of a penis is not important in a relationship as the vagina is not sensitive. He did not know this.
>
> A week later he gave this advice to the patient. The patient his [sic] Asian and he is a large black man and this advice may not have gone well. It would be different if it had been me. You need to be careful when you say these things.
>
> CH Is this conversation usual?
>
> LB it depends on your experience and confidence. We have male and female sexual health advisors for this as well. I don't think he is competent or confident enough to give this advice. His point of view of sexual relationships is the man has the power. He believes that if a man buys drinks for a woman or dinner or cinema, he is indirectly paying for sex. He has told me this before some time ago. The health questionnaire asks whether a patient has paid for, or been paid, for sex.
>
> CH Did you discuss this or ask him this?
>
> LB He said something like, not a yes or a no. If you pay for a drink or meal you are kind or [sic] paying for sex."

95 Thus, the comment was plainly made about a situation other than that of patient 3, and we were satisfied without a shadow of a doubt that Ms Adcock's decision that the claimant should be dismissed was based purely on what he had done in relation to, and with, patient 3.

96 Separately, we asked ourselves by reference to a hypothetical comparator (a white man, or a woman) whether or not Ms Adcock's conclusion might have been different if the claimant had been white or a woman, and we were satisfied, again without any doubt at all, that Ms Adcock's decision would have been the same.

The claimant's appeal against the decision to dismiss him

97 On 5 October 2018, the claimant appealed against the decision to dismiss him. He did so by completing by hand the form at pages 545-546. The grounds of the appeal were (with spelling errors corrected) as follows:

97.1 severity of sanction

97.2 fairness of process

97.3 evidence on which the disciplinary action was taken

97.4 racial and gender discrimination, and

97.5 defamation of character.

98 The latter ground of appeal was plainly mistaken and was not in practice pursued by the claimant, who (as can be seen from what we say above) remained represented by Mr Channon during the appeal process. The grounds of appeal were expanded upon in the document at pages 558-570 to which we refer in paragraphs 51, 52, 54, and 56 to 58 above. The document at pages 558-570 was accompanied by the bank statement extract to which we refer in paragraph 58 above and a number of statements about the claimant's character, except that the document of Mr Phiri to which we refer in paragraphs 39 and 53 above was also there (at page 594).

99 The appeal was not a rehearing. Rather, its scope was to consider whether (1) the outcome of the appealed decision was fair and reasonable and (2) the procedure followed in arriving at that decision was correct. Ms Beal was given the task of hearing the appeal. At the time, she was the respondent's Interim Chief Nurse. As she said in paragraph 1 of her witness statement (which we accepted, despite her failure to give oral evidence, in the circumstances to which we refer in paragraph 104 below), she started her career as a nurse, and then became a midwife before becoming the head of midwifery at an NHS Trust, after which she had held various Executive Director posts in the National Health Service.

100 The appeal hearing was originally intended to take place on what was for practical reasons the first occasion possible, which was 10 December 2018. However, because of an unexpected illness on the part of a member of the

appeal panel, the hearing had to be postponed to 17 January 2019. The claimant planned to call four witnesses at the appeal hearing. They were stated at the end of the document setting out the claimant's reasons for appealing, at page 570, and were (1) Edna Nafula-Makusa, (2) Mchrizson Zungu, (3) Denver Phiri, and (4) Hibo Jama. On 16 January 2019, Ms Beal refused the claimant permission to call his intended witnesses at the hearing. The email stating the refusal to permit the claimant to call those persons to give evidence at the appeal hearing was sent by Ms Caroline Hunter, HR Business Partner, at page 631. The email did not state the reason for refusal very clearly, merely stating (after some introductory words) that "we do not feel it is appropriate for you to bring your witnesses to the hearing". Ms Beal's email in which she communicated the reason for her decision to a colleague of Ms Hunter was at page 629, and in it she said that the reason was that "[the claimant's intended witnesses] did not attend original hearing and we have their statements". Ms Beal expanded on that explanation in paragraph 10 of her witness statement, by saying that the reason for refusing to permit the intended witnesses to attend was "the fact that none of [them] could give direct evidence to the allegations", but that she "did ... fully consider their written evidence as part of the appeal process". We accepted that paragraph of Ms Beal's witness statement.

101 The appeal hearing took place on 19 January 2019, and notes were made of it, as we say in paragraph 50 above (and we refer to those notes again in paragraphs 81 and 91 above). The claimant did not dispute the content of those notes, and we accepted them as being an accurate record (so far as it went) of what occurred at the appeal hearing.

102 Ms Beal dismissed the claimant's appeal. Her reasons for doing so were stated in her decision letter dated 24 January 2019 at pages 667-669. The nub of her decision was stated on page 668 and was this:

> "To have allowed sexual contact to occur, whether it was consensual or non-consensual, with a patient is totally unacceptable, and goes against the Nursing and Midwifery Council's Code of Conduct. Your actions also had the potential to cause substantial damage to the Trust's reputation. Therefore my decision is to uphold the original management decision.
>
> In addition the HEART values, are the foundation of behaviours expected of staff in the Trust, to ensure excellent patient care. You have not demonstrated the behaviours which fall under Accountability, namely:
>
> - Look and behave professionally at all times
> - Take responsibility for your actions and recognise how it affects others".

103 In paragraphs 19-21 of her witness statement, Ms Beal expanded on that conclusion in the following way.

"19. ... I had considered whether it would have been appropriate for a lesser sanction to have been applied, however given the seriousness of the Claimant's conduct, I did not believe that this would mitigate the risk Mr Zhou presented to the Trust and its patients. I felt that Mr Zhou had failed to show any self-awareness or insight into his actions and did not have confidence in his ability to comply with the Trust's policies and procedures or professional standards. I did not take this decision lightly and was minded of the impact the disciplinary proceedings would have on the Claimant, however I did and still do feel that this was the right decision. Whilst not part of my overriding decision, I was also mindful that Mr Zhou's actions had the potential to cause substantial damage to the Trust's reputation, which was borne in mind when considering the appropriate sanction. I therefore took the decision to uphold the original management decision to dismiss Mr Zhou.

20. My decision to uphold the decision to dismiss Mr Zhou was in no way based upon Mr Zhou's sex or race. Mr Zhou had made reference to negative perceptions, comments and stereotypes made by witnesses during the disciplinary investigation, however I accepted Ms Adcock's evidence during the appeal hearing that the decision to dismiss Mr Zhou was not based on these comments. Ms Adcock accepted that the wording of the disciplinary outcome letter could have been clearer, for which she apologised. In respect of allegation 3, Ms Adcock concluded that the fundamental basis for her decision was that Mr Zhou had admitted meeting up with patient 3 and engaging in a sexual act. Despite the patient having consumed alcohol and drugs, Mr Zhou had not appreciated that the patient may have been vulnerable or that her ability to provide consent may have been compromised. Ms Adcock had made the finding of gross misconduct, warranting dismissal, on the basis that Mr Zhou had breached the Trust's policies and procedures and the NMC's Code of Conduct, for which I agreed.

21. I felt that the disciplinary outcome was fair and reasonable and was based on a reasonable investigation."

A discussion about the impact of the absence of oral evidence from Ms Beal

104 There was before us evidence purporting to justify Ms Beal's failure to attend to give oral evidence, even via CVP. That evidence was in her affidavit, signed on 17 September 2021, which exhibited an extract from a letter from a clinic, dated 5 July 2021. We accepted that evidence. The evidence meant that we could see nothing from which we could justify the drawing of any negative inference from Ms Beal's absence. In addition, Ms Beal's conclusion to dismiss the appeal

appeared to us to be fully justified on an objective basis, in that there was nothing in the circumstances leading up to that decision from which we could see a justification for the drawing of the inference that the decision was to any extent the result of any direct discrimination because of race or sex.

Our conclusions on the claims

The claim of unfair dismissal

The reason for the claimant's dismissal

105 We had no difficulty in arriving at a conclusion about the reason for the claimant's dismissal. That reason was that which we have set out in paragraph 87 above, namely the extract from Ms Adcock's witness statement set out in that paragraph. That reason plainly fell within the definition of "conduct" in section 98(2)(b) of the ERA 1996.

The fairness of the procedure followed in deciding that the claimant had committed that conduct

106 We could see nothing in the procedure followed which was outside the range of reasonable responses of a reasonable employer. For the avoidance of doubt, we did not see in the subject-matter of the claimant's objections (stated in the list of issues set out in paragraph 9 above) to the procedure followed, whether taken individually or collectively, anything that took the procedure outside that range. We now address those objections in turn.

"5.2.1 The claimant contends that particular witness statements and documents were given to him shortly before the disciplinary hearing, held on 23 August 2018, giving him little time to adequately prepare his defence to the allegations."

107 As what we say in paragraph 38 above shows, the claimant was given the material on which the proposal to dismiss him was based 14 days before the hearing of 23 August 2018. The allegation set out in paragraph 5.2.1 of the list of issues was therefore not well-founded factually.

"5.2.2 The claimant was only told the previous evening, 22 August 2018, that his witnesses were not allowed attend the disciplinary hearing because they were only going to give character evidence."

108 As can be seen from what we say in paragraph 40 above, the claimant's representative was told on 21 August 2018, and not 22 August 2018, that the claimant's proposed witnesses could not attend the hearing because their evidence was not sufficiently material. However, while it might have been inconvenient to the intended witnesses to tell them only the day before that they

were not needed to give evidence, that would not, if it had occurred, have put the respondent's procedure followed in deciding that the claimant should be dismissed outside the range of reasonable responses of a reasonable employer.

"5.2.3 For a period of eight weeks, the claimant was not told that his suspension was being reviewed, as required under the respondent's disciplinary policy."

109 The manner in which the claimant's suspension was dealt with by the respondent did not in our view affect in any way the fairness of the procedure followed in deciding that he should be dismissed.

"5.2.4 The claimant was not allowed to call his witnesses to the disciplinary hearing."

110 The claimant was not allowed to call his intended witnesses to give evidence in person at the disciplinary hearing because they said nothing material about the circumstances which were under consideration at that hearing. Certainly, they were going to say nothing about the circumstances of and surrounding patient 3. The only evidence of any of the claimant's intended witnesses that was capable of being remotely relevant to the allegations about patient 3 was to the effect that the claimant knew patient 3 socially before he saw her in the sexual health clinic at which he worked. That was the evidence of Mr Phiri. We were not at all sure that it was material, since Mr Phiri must have relied in asserting that the claimant knew patient 3 on what the claimant told him (Mr Phiri) about patient 3. In any event, we did not see the refusal to permit Mr Phiri to attend and attest orally that the claimant knew patient 3 before she attended the sexual health clinic at which the claimant worked as being outside the range of reasonable responses of a reasonable employer.

"5.2.5 The respondent's witnesses did not give evidence in relation to the allegations, but evidence based on stereotypes and perceptions of the claimant as a well-built black male."

111 This allegation was plainly wrong in so far as it was to the effect that the respondent's witnesses gave no evidence that was relevant to the allegations concerning patient 3. As for the evidence of Ms Blanco to which we refer in paragraphs 93 and 94 above, it was not material to the allegations concerning the claimant's conduct towards patient 3. In addition and in any event, as we say in paragraphs 95 and 96 above, that evidence in no way influenced Ms Adcock's decision that the claimant should be dismissed.

"5.2.6 The evidence relied upon, by the respondent was inconsistent and biased against the claimant."

112 This allegation was far too general to be material. In any event, we rejected it in that we found (see paragraph 122 below) that there were reasonable grounds

for the conclusion that the claimant did the things for which Ms Adcock decided (see paragraph 87 above) he should be dismissed.

"5.2.7 The respondent lied, stating that it gave the claimant's witnesses and its witnesses the same notice of the disciplinary hearing, namely 48 hours."

113 This allegation was simply not well-founded factually, as can be seen from what we say in paragraph 38 above.

"5.2.8 The respondent took 21 days to send the outcome of the disciplinary hearing to the claimant."

114 Even the claimant recognised (see paragraphs 1, 81, 83 and 85 above) that he was told that he was dismissed on 29 August 2018, so that there was no more than 6 days' delay after the hearing of 23 August 2018 before he was told the outcome of the hearing. The fact that the letter formally recording that outcome was sent only on 21 September 2018 (see paragraph 89 above) was unfortunate, but did not mean that the procedure followed in deciding that the claimant should be dismissed was outside the range of reasonable responses of a reasonable employer.

"5.2.9 The respondent failed to respond to the claimant's grounds of appeal within 28 days, in breach of its policy."

115 It was undoubtedly true that the respondent did not arrange a hearing within 28 days of receiving the claimant's grounds of appeal. However, that did not mean that the procedure followed in deciding that the claimant should be dismissed was outside the range of reasonable responses of a reasonable employer.

"5.2.10 The claimant was not able to call his witnesses at the appeal hearing."

116 It was here, in the circumstances described in paragraph 100 above, in our view well within the range of reasonable responses of a reasonable employer to fail to permit the claimant to adduce oral evidence from the four persons whom he wanted to give evidence at the appeal hearing. That was because (having read the intended witnesses' written statements, at pages 576, 578-580, 586-587, 594, and 499-501) we agreed with Ms Beal's analysis in this regard, stated in paragraph 100 above, namely that none of the witnesses was going to be able to give any evidence that was going to assist the determination of the appeal.

"5.2.11 During the appeal, the respondent relied on the negative perceptions and stereotypes given by its witnesses, of the claimant as a well-built black man."

117 We have set out Ms Beal's evidence in this regard in paragraph 103 above. We consider in paragraph 121 below the question whether there was any indication in the evidence before us that Ms Beal's decision to dismiss the appeal had

been influenced to any extent by "the negative perceptions and stereotypes given by [the respondent's] witnesses, of the claimant as a well-built black man". Having accepted (in paragraph 82 above) that Ms Adcock's notes at pages 769-776 were accurate, and having accepted in paragraphs 92-96 above her evidence about the impact on her of what Ms Blanco had said in that regard (namely that it had no effect on her, Ms Adcock's, decision that the claimant should be dismissed), we concluded that the respondent (in fact, of course, it was one part of the respondent's staff rather than the respondent as such) did not during the appeal rely on the only negative perception and stereotype indicated to it, namely that of Ms Blanco, in opposing the claimant's appeal.

"5.2.12 The respondent did not have any evidence to support the allegation of improper conduct with a female patient."

118 The respondent had before it the claimant's own evidence about his conduct towards patient 3. In addition, there was the evidence set out or referred to in paragraphs 24-30 above about what patient 3 had herself said about the claimant's conduct towards her. Plainly, therefore, the allegation in paragraph 5.2.12 of the list of issues was not well-founded factually.

"5.2.13 Historically, the respondent raised, at different times, allegations of the claimant's improper conduct towards patients with a view to incriminating him and to dismiss him."

119 This allegation was rather vague and certainly could be read only as an allegation that there had been the raising in bad faith of allegations of misconduct by the claimant and therefore, by implication, that the decision to dismiss him was made in bad faith. We were satisfied that neither the decision of Ms Adcock that the claimant should be dismissed nor that of Ms Beal to dismiss the claimant's appeal against that decision was made in bad faith: both decisions were, we were satisfied at least on the balance of probabilities, made in good faith, or at least without any bad faith.

"5.2.14 The claimant's dismissal and the appeal outcome were discriminatory based on his colour and his sex being a man."

120 This was the main basis of the claim of direct discrimination because of race and/or sex. Given our findings stated in paragraphs 95 and 96 above, we rejected this allegation in so far as it related to the decision to dismiss the claimant.

121 As for the decision of Ms Beal to dismiss the claimant's appeal, we saw nothing in the circumstances from which we could draw the conclusion in the absence of an explanation for it from the respondent (or Ms Beal) that that decision was to any extent affected by the claimant's race and/or sex. Despite the absence of oral evidence from Ms Beal, we therefore concluded that her decision to dismiss

the claimant's appeal was in no way influenced by his race or his sex. One of the reasons for that was the factor to which we now turn.

Were there reasonable grounds for deciding that the claimant had committed that conduct?

122 We were of the clear view that there were ample grounds for deciding that the claimant had committed such misconduct as to justify his dismissal. If we had had any doubt about that, then it would have been dispelled by the claimant's own admission, recorded in paragraph 76.1 above, that he had breached professional boundaries. However, having, as stated in paragraph 74 above, accepted Ms Adcock's evidence in paragraph 73 above, and given the factors to which we refer in those paragraphs and in paragraph 75 above, we had no doubt that there were reasonable grounds for concluding that the claimant had done the things (i.e. the conduct) for which he was dismissed.

Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

123 We had no doubt that the claimant's dismissal was within the range of reasonable responses of a reasonable employer.

Race and/or sex discrimination

124 Given what we say in paragraphs 120 and 121 above, we concluded that the claimant's dismissal was in no way tainted by direct discrimination within the meaning of section 13 of the EqA 2010 because of race and/or sex.

125 However, the comment of Ms Blanco at page 405, which we have set out in paragraph 94 above, was clearly capable of being found by us to be less favourable treatment of the claimant because of his race and/or sex. Nevertheless, that comment was made by Ms Blanco on (it was clear from the document of which page 405 was a part) 6 February 2018. This was the comment which was the subject of paragraphs 5.11.1 and 5.11.2 of the list of issues, which we have set out in paragraph 9 above. Thus, the question whether the claim in that regard was made in time was in issue, but that question was not stated in the list of issues. It was, nevertheless, one which we were obliged to consider because it was jurisdictional.

126 The ET1 claim form was presented (see paragraph 1 above) nearly a year after the comment was made. The claimant was (see paragraph 38 above) made aware of that comment at the latest when he was sent the document recording it enclosed with the letter of 9 August 2018 at pages 346-347. The claimant put no evidence before us to justify the delay in making the claim or which would otherwise entitle us to conclude that it was just and equitable to extend time for the making of the claim. As a result, we were forced to conclude that the claim in

respect of Ms Blanco's comment, set out in paragraph 94 above, was outside the jurisdiction of the tribunal.

127 For the avoidance of doubt, we concluded that the respondent did not in deciding that the claimant should be dismissed rely on "stereotypical views about men and the fact that the claimant is a black male" as asserted in paragraph 5.11.3 of the list of issues. Otherwise, that claim was too general to be determined. For both of those reasons, therefore, that claim did not succeed.

In conclusion

128 For all of the above reasons, the claimant's claims did not succeed and were dismissed.

_____

Employment Judge Hyams

Date: 13 October 2021

SENT TO THE PARTIES ON

15th October 2021
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THY

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FOR THE TRIBUNAL OFFICE