EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**v**	**RESPONDENT**
Mr E Chandraharan		St George's University Hospitals NHS Foundation Trust

Heard at:	London South Employment Tribunal	**On:**	20, 21, 24, 25, 26, 27 & 28 January 2022

Before: Employment Judge Hyams-Parish
Members: Ms S Dengate and Mr K Murphy

Representation
For the Claimant: In person
For the Respondent: Mr O Isaacs (Counsel)

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claim of unfair dismissal fails and is dismissed.

(b) The claim of wrongful dismissal fails and is dismissed.

(c) The claim of race discrimination fails and is dismissed.

REASONS

A. CLAIMS

1. By a claim form presented to the Employment Tribunal on 4 May 2020, the claimant brings the following claims against the respondent:

   - Constructive/unfair dismissal
   - Wrongful dismissal
   - Race discrimination (direct)

2. The parties had agreed a list of issues which can be found in the Schedule to this judgment. They do not include issues relating to the constructive dismissal claim for the reasons explained at paragraph 109 below. Neither do they include issues relating to remedy.

B. THE HEARING

3. A timetable was agreed with the parties at the outset of the hearing. In order that the hearing could be completed and a decision given at the end of the hearing, the parties were asked to adhere to the timetable, which they did. The Tribunal gave its oral decision at 3pm on the final day of the hearing. The respondent requested these written reasons at the hearing after the oral decision was given.

4. At the hearing, the claimant gave evidence, together with the following witnesses on behalf of the respondent:

   (a) Ms Karen Daly, Consultant Orthopaedic Surgeon and formerly Responsible Officer and Associate Medical Director.

   (b) Mr Austin Ugwumadu, Consultant and Clinical Director of Obstetrics and Gynaecology.

   (c) Ms Jessica Moore, Consultant Obstetrician and Care Group Lead for Obstetrics.

   (d) Ms Alison Benincasa, Director of Quality Governance and Compliance, Chair of Disciplinary Panel.

   (e) Mr Andrew Grimshaw, Chief Financial Officer and Deputy Chief Executive, Chair of Appeal Panel.

   (f) Ms Suzanne Marsello, Chief Strategy Officer, Case Manager.

(g) Dr Stephanie Bown, External Consultant, Investigating Officer.

(h) Ms Claire Low, HR support to Obstetrics & Gynaecology, Medical HR Manager.

5. During the hearing, the Tribunal was referred to documents in two hearing bundles. The claimant had also attached some additional documents as exhibits to his witness statement.

6. Both parties provided written submissions which were supplemented by oral submissions after the evidence was completed. The Tribunal considered these submissions very carefully before reaching its conclusions below, including the case law referred to. If a particular case referred to by either party has not been specifically referred to in this judgment, it does not mean that the Tribunal did not consider it.

C. BACKGROUND FINDINGS OF FACT

7. The Tribunal decided all the findings referred to below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that the Tribunal failed to consider it. The Tribunal has only made those findings of fact necessary for it to determine claims brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

8. Where individuals have been referred to who did not give evidence at the hearing, the Tribunal has chosen to use their initials.

9. The respondent is a National Health Service Foundation Trust providing acute and community healthcare services to the local population in South West London and specialist services on a national basis. It employs around 9,000 staff in a range of healthcare professions and support roles. The hospital has a very diverse staff from a range of different ethnic backgrounds.

10. The claimant was employed by the respondent until he was summarily dismissed with effect from 6 February 2020 on the grounds of gross misconduct. He commenced his employment on 5 October 2005. He was employed as a Consultant Obstetrician & Gynaecologist (Labour Ward Lead Consultant & Consultant in Acute Gynaecology). In addition, the claimant was the Clinical Director from 2011 to 2015, and the Lead for Clinical Governance in Obstetrics and Gynaecology between 2006 and 2017. When the claimant stepped down as clinical director in 2015, Mr Ugwumadu was appointed to this role.

11. Mr Ugwumadu regularly supervised junior doctors from overseas who wanted to gain experience in obstetrics in the UK, often for six months to a year. Because different jurisdictions have different clinical practices, junior doctors

look to come to the UK to expand their clinical skills (a clinical fellowship). As part of a collaboration with some Italian hospitals, Mr Ugwumadu was often requested to take and supervise their trainees.

12. One such doctor was WX, who Mr Ugwumadu agreed to supervise for a year. She joined the Respondent in August 2015. When she joined, it was agreed that she would carry out audit duties in addition to clinical observation, until her application to practice in the UK was approved by the General Medical Council (GMC). She also worked with Mr Ugwumadu to complete a pre-existing research project, as that was something that was helpful to junior doctors for their career development.

13. Unfortunately, Mr Ugwumadu was absent due to illness for a period of 4-5 weeks from September 2015. During this period, WX found herself working with the claimant.

14. The following account by WX (at paragraphs 15-21 below) was provided to Ms Low in June 2019.

15. On 15 October 2015, the claimant invited WX to a CTG (Cardiotocography) Masterclass in Poole. WX said that she had tried to book her own room but the claimant said that he would book a hotel room for her as well. WX said that the claimant gave her a book to read prior to the conference.

16. On 29 October 2015, the claimant picked WX up from her flat to go to the CTG Masterclass. The claimant asked her about her personal life. He referred to himself and WX as "*Commander and Commandee*" and said that he was offering her "*special training*". The claimant told WX that she was the 17th special trainee and that he still kept in touch with previous trainees. The claimant told WX not to say anything to anyone as no one would understand.

17. During the car journey, the claimant asked WX a question from a chapter in the book he had given her. For getting the question wrong, he suggested that she should take one item of clothing off. WX declined and thought it was a joke.

18. Upon arrival at the hotel, the claimant checked both WX and he in. Their rooms were on the same floor, albeit not close to each other. The claimant asked WX to join him in his room to practise a presentation. WX asked that they practice in reception, but the claimant said it was too noisy. Once in his room, the claimant asked WX to take off her clothes for the mistake that she had made. The claimant did not touch her. It felt to WX that it was all about mental control. The claimant told WX that it was only if she was scarred that she would avoid future mistakes and improve her skills. Her mistake could mean that someone would die. The claimant told WX that she "*needed to have a scar*".

19. WX took off her clothes until she was naked. The claimant did not do anything. The claimant told WX to "*look at her image in the mirror, in front of her Consultant, so that she would never repeat the mistake again*".

20. The claimant and WX had dinner together. He told her that he was married and that there was no sexual intention on his part. The claimant asked her lots of personal questions. After dinner the claimant told WX that he was good at massage. It was a special massage, where she could achieve an orgasm by the claimant only touching her back. The claimant gave WX a coin, and said when she was ready to give it back, she was ready to accept the pleasant experience. WX went back to her room with the coin. In evidence, the Claimant said that he gave all his trainees a 50 pence coin to remember him when he died.

21. WX said she went back to her room. She had a shower and during that time she said she woke up and understood what was happening. She didn't have much money and she was not being paid. WX was alone in a small town; she said she felt like an "*antelope trying to run away from a lion*". WX sent a WhatsApp message to her best friend telling her where she was if anything happened to her.

22. In March 2016, WX met with Ms Moore and told her about her encounter with the claimant during the conference visit to Poole. Ms Moore had understood WX's account to be that she had taken some items of clothing off in the car, but WX later corrected this. She confessed to having been humiliated and embarrassed by the incident. She explained that it had taken a while for her to come forward as she was confused, and blamed herself for what had happened. She had received some counselling in November 2015.

23. When Ms Moore discussed the option of raising a complaint about the incident, WX said she would likely only do so at the end of her Honorary Fellowship, just before she returned to Italy. She was insistent that Ms Moore should not share her disclosure with others. WX was fearful of repercussions as she felt the claimant was very powerful and could damage her career prospects through his international contacts. She said she was terrified of the claimant, had tried her best to avoid him at work and had asked her boyfriend to escort her to and from the hospital as she did not feel safe.

24. So concerned by what she was told by WX, Ms Moore telephoned the GMC helpline to seek advice on a "*no names*" basis. She had no doubt that WX had been truthful when telling her what had happened with the claimant. Ms Moore subsequently spoke to ED, the HR manager for her division at the time. ED advised Ms Moore that the complaint could only be investigated once WX had agreed to provide a witness statement.

25. On 18 August 2016, Ms Moore received a text from WX apologising that she had decided not to take it further. WX had met with ED the previous week. WX was told that she would require a lawyer in the event that an investigation was launched and the claimant challenged her account. WX said she felt unable to proceed any further due to her own personal circumstances and lack of money to engage a solicitor, with no indication from HR that it would provide her with support. Ms Moore was taken aback that HR was not more supportive of

someone raising these types of concerns. She was also saddened that WX felt unable to pursue the matter any further. Ms Moore felt that this left her in an awkward situation because she shared an office space with the claimant.

26. In September 2016, WX approached Mr Ugwumadu to tell him about the incident with the claimant as she said she did not want him to hear about it from a third party. Mr Ugwumadu asked WX if she would be prepared to provide a witness statement of the incident involving the claimant but again said she was reluctant to do so, fearing the potential psychological and financial consequences of doing so. Without a witness statement, Mr Ugwumadu was told by HR that formal action could not be taken.

27. Mr Ugwumadu met with the claimant and relayed to him what WX had reported. Mr Ugwumadu was dissatisfied with the claimant's response, which was to deny the incident happened. Mr Ugwumadu did not think the claimant's denials were genuine. However, in light of the advice from HR, Mr Ugwumadu informed the claimant that no further action would be taken, but that if it did happen, there should be no repeat of it. Mr Ugwumadu also invited the claimant to ask WX for a withdrawal of the allegations if what he said was true, namely that the incident did not happen at all.

28. In February 2017, the respondent was made aware of an anonymous letter received by Health Education England (an external body responsible for the training of trainee doctors) which alleged that Mr Ugwumadu had coerced WX to make up false allegations against the claimant because Mr Ugwumadu was envious of the claimant’s success. The letter also alleged that Ms Moore and PB were racists and were plotting to rid the department of brown skinned consultants, including the claimant, AB, and Professor BT. Mr Ugwumadu believed that the claimant had written the letter. The allegations were investigated but they were not upheld by the Respondent.

29. In March 2017, the claimant sent WX two emails asking her to confirm if anyone had advised her to complain against him. His second email threatened her with defamation action to seek £2 million in damages.

30. During a further conversation with WX, Mr Ugwumadu shared with her the anonymous letter as he wanted her to be aware of what was being suggested in it. WX told Mr Ugwumadu that no one had coerced her to complain. She said she was not the only one to have attended CTG masterclasses and she told Mr Ugwumadu that a previous fellow, SC, had also received ‘approaches’ by the claimant. WX said that she had warned SC about the claimant.

31. Mr Ugwumadu approached SC in July 2017 and asked her about her experience of the claimant. SC told Mr Ugwumadu how the claimant started to be nice to her, gave her a book, took her to his operating sessions, and invited her to an external masterclass, which she declined because WX had already warned her of her own experience of attending an external masterclass with the claimant.

32. Mr Ugwumadu took his concerns about what he had been told by WX to his divisional director, JR, and ED. He also spoke to Ms Daly who was critical of the previous advice provided by HR. Mr Ugwumadu also spoke to the GMC on a no names basis following a conversation with them about another matter. He subsequently lodged a formal complaint with the GMC.

33. In August 2017, the claimant received informal advice that he should avoid anything similar happening in the future. If it did, he was told he would face formal disciplinary action.

34. In September 2017, Mr Ugwumadu contacted WX again to capture her account in more detail and to take a note of it, as he had not taken notes previously. Despite this, no further action was taken against the claimant by the respondent.

35. On 20 December 2017, the Divisional Director, JR, wrote to the claimant in which he said as follows:

> ***....We did discuss the background around the investigation and reiterated that as far as the trust is concerned the issues surrounding yourself were closed and no further action is proposed and that there was insufficient evidence to prove or disprove the allegations. Whilst I appreciate that is not helpful and leaves you feeling in limbo and uncertain, I explained that this was not likely to change and that no further closure was possible...***

36. Notwithstanding the above, concerns about the claimant's behaviour reappeared in 2019. Ms Moore was working on the delivery suite on 14 February 2019 when she was approached by a midwife, IC. IC relayed to Ms Moore that YZ, an overseas Honorary Fellow, had told her about a distressing encounter with the claimant at a CTG masterclass event.

37. On 11 April 2019, Ms Moore received a WhatsApp message from YZ in which she asked to meet Ms Moore in person. YZ and Ms Moore met the following day. YZ was very nervous and upset by what she had experienced. She felt conflicted as the claimant had promised to further her career and she had been flattered by his interest in her.

38. The following account from YZ (paragraphs 39-43 below) is taken from the interview with Ms Low and Ms Daly on 10 May 2019.

39. YZ first met the claimant when he visited Parma in 2015. YZ told the claimant that she had GMC Registration, and the claimant told her to come to St George's for 6 months to become a CTG expert. She commenced her fellowship with the respondent in November 2018. YZ described three incidents involving the claimant.

40. The first was when YZ met the claimant in a hotel room in London when YZ said that the claimant made a number of sexualised comments to her.

41. She then attended a CTG masterclass with the claimant on 27 November 2018 in Watford. YZ had thought Watford was further away given that they were staying in a hotel. On the way to the hotel, the claimant asked YZ how much trust there was between them. He repeated the question a number of times and then asked her what she would have said if he were to suggest that they were to sleep in the same room. YZ responded that she would feel uncomfortable. She said she was happy to pay for her room and she did not want to sleep with him. The claimant told YZ that she had too many barriers and social limits. The claimant asked YZ to join him in his room because it would be more comfortable to work there and practise a presentation. YZ did not feel comfortable with that suggestion. She did not feel she was in a good place, and that she had a boyfriend. She told the claimant it didn't feel right, to which he replied "*do you think I would waste my career for you?*"

42. YZ subsequently attended a CTG masterclass with the claimant in Poole on 29 November 2018. YZ and the claimant travelled to the conference together by car. The claimant told YZ that "*only strong minds could change the world*" and that "*he needed strong minds next to him*". YZ asked him about this and told him that she personally wouldn't like to betray her partner. As they both approached the hotel, the claimant asked YZ about sleeping in the same bedroom. YZ refused and the claimant said that social barriers were her problem. The claimant asked YZ to go to his room to work before dinner. YZ went to his room as she was reassured by what he had told her in Watford. As they both started working, the claimant started massaging YZ's neck. YZ told him to stop, and then she moved away. The claimant touched her again, a bit lower down her back. This happened two or three times and every time YZ asked him to stop, he would start again. YZ said the next time he quickly put his hand on her back under her top and quickly moved it then towards her bottom. YZ responded by slapping his hand away and said "*Edwin, what are you doing? I don't know what you've been thinking, but I don't want to have sex with you Edwin*". The claimant said "*I promise no sex, at least for me*". The claimant then apologised, saying that it was the first time in 15 years he had got his diagnosis wrong.

43. YZ said that the day after went well, that she thought everything would be ok. However upon leaving Poole, the claimant said to her: "*In five years time you will look back and remember that in Poole you lost an opportunity and someone else will take your place*". YZ said she asked the claimant whether that meant she would not be able to attend Masterclasses in future, to which the claimant responded that he "*needed a strong mind next to him*". The claimant later told YZ "*You lost an opportunity. There will be someone else taking your place*".

44. On 18 March 2019, the claimant declined YZ's request to work as a locum on the labour ward.

45. During the above mentioned meeting between YZ and Ms Moore on 12 April 2019, YZ informed Ms Moore that she had met WX and was aware of the concerns she had raised. They had in fact been introduced to each other by

IC. Ms Moore suggested that they all meet so that they could discuss how they can best be supported.

46. On 13 April 2019, Ms Moore met up with IC, WX, YZ and RT. RT was a Clinical Research Fellow working in the ward at the time and was previously a trainee doctor. She was a strong advocate for women's rights and her presence at the meeting appeared to provide both WX and YZ with a great deal of support and encouragement. At that meeting, WX appeared much more willing to step forward and pursue her allegations formally about the claimant's conduct in 2015 and 2016. According to Ms Moore, she looked empowered and was angry. Her demeanour was very different to previous times when she had looked defeated. Ms Moore believed that RT's support and attendance at the meeting galvanised WX and YZ to formally proceed with their complaints against the claimant.

47. On 13 April 2019, Ms Moore was added to a WhatsApp group set up by IC, YZ and WX. RT was added on 31 May 2019. The group was a means to support WX and YZ in taking their allegations forward.

48. On 15 April 2019, Mr Ugwumadu met with Ms Low to check what would happen if formal complaints were made by either or both WX and YZ. ED was still working with the Respondent but due to her previous involvement and concerns about her previous advice, Mr Ugwumadu and Ms Moore felt that it would be better to approach Ms Low.

49. The concerns raised by Mr Ugwumadu were discussed at the respondent's Responding to Concerns panel on 23 April 2019. The panel is a means for the respondent's senior management team to discuss concerns about doctors and how they should be progressed, whether that be formally or informally. Ms Low informed the panel of her recent discussions with Mr Ugwumadu, including what Ms Moore had relayed to him about YZ and WX.

50. HB (HR Director at the time) believed the respondent had dealt with the WX issue at the time. He confirmed that he had met with the claimant and provided informal advice not to put himself in that position again. As there was no statement from WX they felt the matter could not be progressed beyond a conversation with the claimant.

51. It was agreed by the panel that Ms Low should meet WX, YZ and the claimant with Ms Daly.

52. They met YZ on 10 May 2019 when she gave the account provided above.

53. They met with the claimant on 13 May 2019 and explained that they had received a complaint from a Clinical Fellow. They did not provide him with a great deal of detail, because at that point YZ had not confirmed that she wished to proceed with the allegation. They told him that there had been an allegation against him in respect of sexually inappropriate behaviour at one of his CTG

masterclasses. The claimant was told that a formal MHPS[1] investigation would commence in due course. The claimant was unhappy that they did not provide him with the complainant's name. Ms Daly warned the claimant that he may be restricted from doing further CTG masterclasses.

54. On 18 July 2019, Ms Marsello wrote to the claimant stating that she had been asked to instigate an investigation into the following matters [sic]:

> ***1. That you made unwanted sexual advances to a trainee.***
>
> ***2. That you suggested that the trainee had 'lost an opportunity and somebody else will take your place' which would appear to follow rejection of sexual advances.***
>
> ***3. That you were unfairly critical of the trainee, which would appear to follow rejection of sexual advances.***
>
> ***4. That you abused your position of authority in a trainer/trainee relationship.***
>
> ***5. That you, in acting in this way, failed to follow the advice of Professor Rhodes and Mr Brar which was documented in writing after his meeting with them on 9 August 2017.***

55. On 22 July 2019, the claimant sent to Ms Marsello a detailed response to her letter, essentially denying the allegations.

56. Ms Marsello arranged for the investigation to be conducted by an independent investigator, Dr Bown. Dr Bown sought an extension to the terms of reference which was agreed by the respondent and notified to the claimant on 15 August 2019. The new terms of reference stated as follows:

> 1. ***That Mr Chandrahan made unwanted sexual advances to an honorary clinical fellow in October 2015.***
>
> ***2. That Mr Chandraharan sent emails to an honorary clinical fellow in March 2017 which were inappropriate and threatening.***
>
> ***3. That Mr Chandraharan made unwanted sexual advances to an honorary clinical fellow in November 2018.***
>
> ***4. That following the rejection by the fellow of Mr Chandrahan's sexual advances in November 2018, Mr Chandrahan sought to exert pressure on the fellow to change her mind by stating to her in private words to the effect that she had lost an opportunity and that somebody else would take her place.***
>
> ***5. That Mr Chandraharan was unfairly critical of the fellow, which would appear to follow her rejection of his sexual advances.***
>
> ***6. That Mr Chandraharan abused his position of authority in a senior consultant supervisor/ junior overseas fellowship relationship with more than one individual on three occasions.***

[1] MHPS is the equivalent of a disciplinary policy used by the NHS for doctors and dentists

7. That Mr Chandraharan, in acting as alleged in November 2018, failed to follow the advice of Dr Rhodes and Mr Brar which had been given to him in writing after his meeting with them on 9th August 2017

8. That Mr Chandraharan's conduct as alleged appears to constitute breaches of the code of professional conduct set out by the General Medical Council in Good Medical Practice (2013), the Trust Dignity at work Policy (February 2017) and the Trust Values and Behaviour Policy (June 2011, September 2017).

57. Dr Bown and NB (senior HR manager) conducted interviews with 19 individuals over eight days between 2 and 29 August 2019. Face-to-face interviews were conducted with ten individuals and telephone interviews were conducted with the remainder, five of whom were based overseas. A final report was produced dated 10 October 2019. The report was peer reviewed by LS, a former director at Verita, an independent consultancy firm with whom the case investigator had worked in the past.

58. The report was considered by case manager, Ms Marsello, who concluded that there was a case to answer in relation to all allegations apart from allegation 5 at paragraph 56 above. The claimant was informed of this by letter dated 5 November 2019.

59. By letter dated 5 December 2019, the claimant was invited to a disciplinary hearing to be held on 5 February 2020, to answer seven of the eight allegations at paragraph 56 above (all apart from allegation 5).

60. On 14 December 2019, the claimant submitted a letter of resignation. In it he gave three months' notice of the termination of his employment. He referred to the false allegations being made against him and the toxic environment he was forced to work in.

61. On 8 January 2020, the claimant submitted a 60 page document setting out his response to the disciplinary allegations. In it he denied the allegations by WX and YZ, stating that attempts were being made by a "*few senior colleagues in my department to coerce vulnerable, Italian clinical fellows who have been refused permission to work in the Labour Ward by me, purely on patient safety grounds, to make complaints of unwanted sexual advances against me*". The criticisms of the respondent's case are essentially those that are dealt with in the conclusion to this judgment. He pointed to inconsistencies in WX and YZ's version of events to demonstrate that their evidence was not credible and should not be believed.

62. A disciplinary hearing took place on 5 February 2020. The allegations were heard by a panel of three, chaired by Ms Benincasa. Also on the panel was Divisional HR manager, JH, and JM (an external panel member and consultant from a different hospital).

63. A decision was made to dismiss the claimant summarily on the grounds of gross misconduct. The claimant was sent a short version of the dismissal letter dated 6 February 2020 and a more detailed letter some days later, dated 14 February 2020.

64. The claimant appealed against his dismissal. Whilst the appeal panel raised certain learning points arising from their consideration of the process leading to the dismissal, they upheld the original decision.

D. LEGAL PRINCIPLES

Unfair dismissal

65. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98 ERA states:

> ***(1) In determining….whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

66. What is clear from the above is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the employer acted fairly in treating that reason

as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness: it is a neutral burden shared by both parties.

67. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually justified the dismissal because that is a matter for the Tribunal to assess when considering the question of fairness.

68. In a conduct case, it was established in ***British Home Stores v Burchell [1980] ICR 303 EAT*** that a dismissal for misconduct will only be fair if, at the time of the dismissal:

- the employer believed the employee to be guilty of misconduct;
- the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- at the time it held that belief, it had carried out as much investigation as was reasonable.

69. In ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT***, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances the decision to dismiss the employee fell *within the band of reasonable responses* which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. In ***Sainsburys Supermarket Ltd v Hitt [2003] ICR 111 CA*** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal itself.

70. Importantly, in ***London Ambulance NHS Trust v Small [2009] IRLR 563 CA*** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of the dismissal. It should be careful *not to substitute its own view* for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

71. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

Wrongful dismissal

72. In wrongful dismissal cases, employers typically rely on serious or gross misconduct by the employee to justify summary dismissal. But it is important to remember that the underlying legal test to be applied by a Tribunal is whether there has been a fundamental or repudiatory breach of contract by the employee entitling the employer to treat the contract as at an end.

73. The Tribunal's function when considering a claim of wrongful dismissal is very different to that of an unfair dismissal claim. In a wrongful dismissal case, the Tribunal does not look at the employer's actions and decide whether it was reasonable for the employer to treat the claimant's conduct as a repudiatory breach of contract. The Tribunal itself has to be satisfied that the claimant did, on the balance of probabilities, commit a repudiatory breach of contract.

74. Where an employer dismisses for a breakdown in trust and confidence, that is in essence a reliance on a breach of the implied duty not to "*without reasonable and proper cause"* conduct oneself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee; ***Malik v Bank of Credit and Commerce International SA [1997] I.C.R. 606***.

Direct discrimination (s.13 EQA)

75. Section 39(2) EQA states that an employer must not discriminate against an employee by dismissing him or her, or subjecting him or her to any other detriment.

76. Section 13 EQA prohibits direct discrimination and states the following:

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

77. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?*" Put another way, "*What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?*" It is well established law that a respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

78. The provisions relating to the burden of proof are set out at s.136(2) and (3) of EQA which state:

> ***(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.***

79. It is for the claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the respondent, that the respondent committed an act of discrimination. Only if that burden is discharged would it then be for the respondent to prove that the reason for the treatment of the claimant was not in any sense whatsoever because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the respondent only if the claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a claimant has been treated less favourably because of a protected characteristic.

80. Notwithstanding what is said above, in ***Laing v Manchester City Council and another 2006 ICR 1519, EAT***, the point was made that it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

General comments

81. The Tribunal turned to each of the claims, applying the legal principles to the facts, in order to reach a decision. Before doing so, it considered the quality of the evidence and the case overall.

82. The Tribunal found the respondent witnesses to be genuine, convincing and very credible. They answered questions to the best of their ability, with clarity and detail and were not at all evasive. Their evidence was both internally and externally consistent. The Tribunal could find no reason to doubt what they said.

83. In contrast, the Tribunal found the claimant difficult to believe at certain points in his evidence. He was deliberately selective when referring to evidence and tended to cherry pick extracts from documents and correspondence which tended to give a misleading impression of what the documents or correspondence said. His interpretation of documents he was taken to in questioning was, at times, nonsensical and defied common sense. A simple example was his suggestion that he did not interpret allegations 4 and 5 in his invitation letter to the disciplinary hearing to be one allegation, rather than two, in circumstances where it was obvious that whoever typed the letter had pressed the return key in error, resulting in one allegation being split into two. It meant that allegation 4 no longer made any sense by itself. The Tribunal did

not accept that the claimant, a highly intelligent professional who was also represented by the BMA, was confused at all by this error, as he suggested.

84. The claimant often tended to refuse to accept the obvious, preferring instead to try to muddy the picture for the Tribunal. An example of this was when the claimant would not accept that he had received an amended copy of WX's interview, instead asking Counsel what the differences were between the two versions in circumstances where he knew full well what they were. On the final morning of the evidence, when still being questioned, the claimant refused to believe it was possible for a student to be asked technical questions about a subject, insisting that it could only be done through a practical activity. It was an attempt to deny that there had been any questioning of WX in the car to Poole, which was completely unconvincing.

85. Finally, the claimant has throughout this case made serious accusations which were wholly unsupported by the evidence. Dealing with one of the race discrimination claims as an example of this point, the claimant alleged as part of his case that Ms Low fabricated WX's allegations in order to start an investigation against the claimant. In fact, it became clear that this was not an allegation of fabrication at all and it was disingenuous of the claimant to have said so. What he was complaining about was the fact that she had gone to a meeting with WX and had not taken a note taker. She did her best to take notes and it turned out that her record of events was not entirely correct in respect of some details, albeit the essential details were correct. The Tribunal concluded that there was no evidence at all of fabrication and, moreover, that the claimant knew full well that there was none.

Race discrimination

86. Turning now to the allegations of race discrimination, the Tribunal acknowledged of course the difficulties for claimants when attempting to prove that they have been subject to race discrimination, or indeed any form of discrimination. Respondents rarely attend a hearing and admit that they have discriminated. Discrimination may also be very subtle, albeit very real. The law makes allowances for this by providing for the burden of proof, which means that the respondent must disprove discrimination provided that the claimant has first established facts from which the Tribunal *could* find discrimination. The Tribunal can also infer discrimination from primary facts where it is appropriate to do so. In this case, the claimant could point to nothing from which the Tribunal could infer that certain actions taken by the respondent were not for the reason stated, but rather because of race. Indeed at one point, all the claimant could do was point to a '*feeling*' or '*suspicion*' that the reasons for the respondent's behaviour were racially motivated. It is worth also noting that the claimant said in evidence that he had never been subjected to race discrimination from anyone in the department or in the Trust.

87. In support of what he described as a pattern of behaviour, the claimant referred the Tribunal to some documents, including the investigation in to the anonymous letter referred to at paragraph 28 above, and two CQC reports.

One such report referred to BAME employees believing that they had not been given the same opportunities as less experienced white employees in some areas. In another report, the following was stated:

> ***Culturally, there had been much progress within the trust. However, there were still areas for improvement, which the trust had identified. These included:***
>
> - ***Continuing work on addressing bullying and harassment within the trust.***
> - ***Embedding and ensuring that there were clear objectives for, and awareness of, equality and diversity networks.***
> - ***Promoting equality and diversity in staff's day to day work and when looking at opportunities for career progression for BAME staff.***

88. The claimant also referred to previous minutes of the respondent's trust board where BAME staff issues were mentioned, and the results of a Freedom of Information request which gave certain statistics of BAME staff that had been the subject of disciplinary proceedings.

89. Whilst the Tribunal considered the documents referred to by the claimant as background, the Tribunal noted that there was nothing in those documents which directly related to those individuals the claimant accused of discrimination (aside from his assertion that Ms Moore allegedly lied about PB) or specific allegations of race discrimination complained of by the claimant. The Tribunal also noted that none of the witnesses were taken to these documents or questioned about them during their evidence.

90. Of course, with each of the allegations below, the Tribunal considered carefully the reasons provided by the respondent and considered whether they were the true reasons or whether there was anything racially motivated about what they did. With that in mind, the Tribunal looked at each of the allegations of race discrimination (by reference to the list of issues) and concluded as follows.

Ms Moore colluded with MG [1.2.1(a)]

91. The Tribunal concluded that this allegation was completely without merit. The factual premise of the allegation was wrong because it was clear to the Tribunal that there was no collusion at all between Ms Moore and MG. MG was simply providing Ms Moore with HR advice. The claimant failed to demonstrate, neither could he explain to the Tribunal, how this amounted to collusion. There was no basis at all for suggesting that anything said during the conversation between Ms Moore and MG in May 2017 concerning the allegations made by WX, were in any way whatsoever connected with the claimant's race. This claim fails and is dismissed.

Ms Daly improperly stated to one of the complainants that there was credible evidence that the claimant's behaviour was inappropriate [1.2.1(b)]

92. Whilst some might think it would be unwise to make such a comment, the Tribunal could nonetheless understand why it was made. The Tribunal did not believe the claimant suffered any detriment as a result of this comment at the end of an interview. Had Ms Daly been interviewing a white male colleague faced with the same allegations, the Tribunal did not believe Ms Daly would have acted any differently. This race discrimination claim fails and is dismissed.

Ms Daly imposed another unfair restriction on the claimant [1.2.1(c)]

93. This allegation related to a restriction that the claimant should not communicate (whether verbally, in writing or any other means) with any member of the respondent's staff, with the exception of essential communication about patient care. This included individuals who were no longer members of the respondent's staff.

94. The claimant attempted to persuade the Tribunal that this meant that he could not take advantage of the support that was offered by the respondent, even Occupational Health, if that was needed. The Tribunal was satisfied that the claimant did not interpret the restrictions in this way. Importantly, the Tribunal did not accept that it prevented the claimant from taking advantage of the same support available to any one facing disciplinary action, and neither did the claimant genuinely believe the clause had that effect. If there was any doubt, he could have asked someone. The Tribunal further rejected the claimant's evidence that he would have been subjected to further race discrimination if he had enquired about the restriction. The claimant was represented by the BMA who could also have enquired on his behalf. This was not a decision made by Ms Daly in any event, but one taken by the Responding to Concerns panel. The decision was not in any way connected with the claimant's race. The claim of race discrimination fails and is dismissed.

Ms Moore made a malicious allegation to tarnish the claimant's reputation [1.2.1(d)]

95. Ms Moore gave evidence that she believed that a statement was made to her by YZ that the claimant de-stressed "*by having lots of sex*". The Tribunal concluded that Ms Moore genuinely believed that is what YZ told her. Whilst those exact words do not appear in the documents, the Tribunal accepted that was the essence of what Ms Moore believed YZ to have said. YZ actually reported the Claimant to have said that he admitted that "*this was his disease, this was his way to release the tension because he was doing a very stressful job*".

Ms Moore lied at her interview by stating that the investigation did not find any evidence that her close friend PB made racist remarks [1.2.1(e)]

96. The Tribunal was satisfied that Ms Moore did not lie. It was her interpretation of what she had been told. In any event the claimant did not suffer any detriment and the claimant did not say what she did because of the claimant's race. This claim fails and is dismissed.

Ms Moore repeatedly requested the claimant to step down as the Labour Ward Lead Consultant without providing any valid reasons during the claimant's Job Planning on 23 March 2018 and 10 July 2019 [1.2.2]

97. The Tribunal did not accept that the claimant suffered any detriment because it was simply a discussion about stepping down and he was not required to step down in any event. He continued in the role. It was a perfectly legitimate topic of conversation in circumstances where Ms Moore considered that the claimant was no longer interested in the 'lead' role. It was a discussion that she would have had with a white colleague in those same circumstances. The Tribunal concluded that the claimant had turned an innocent conversation about work planning into something more sinister. This claim fails for this reason.

Ms Moore, by an email on 23 March 2018, attempted to curtail the Regional Service for Abnormal Invasion of the Placenta which the claimant led. The respondent's senior management, by an email on 22 March 2018, unfairly expected the claimant to personally provide a 24/7, high risk complex service when the claimant's colleagues were permitted to have a "team-approach" when they ran any regional referral service [1.2.2]

98. As to the second allegation, the claimant did not cross examine Mr Ugwumadu about his views of the Regional Referral Service. Those views were consistent with those of Ms Moore. The reason why the issue was raised by Mr Ugwumadu and Ms Moore were clear and non-discriminatory. The claimant suggested that this was an attempt to shut down the service but in the Tribunal's view that was a complete misreading of the emails, which did not suggest a closure of the service. Indeed, all Ms Moore suggested was that there needed to be "ongoing approval." That was not suggestive of some form of plot to close the service (as inferred by the claimant), nor did the claimant's response suggest that that was what he believed at the time. The claimant was simply engaging with the points that had been raised by Mr Ugwumadu because he recognised the validity of what had been raised with him. Those reasons were clearly nothing to do with race. This claim fails.

Ms Moore was part of an all White WhatsApp chat group with both the complainants [1.2.3]

99. Whilst the Tribunal acknowledged that there were very real risks in organising a WhatsApp chat group for victims in this way, namely the risk of collusion between witnesses, the Tribunal accepted that the motives were genuine and that the group was set up to support two employees who found the prospect of complaining very difficult indeed. Furthermore, the respondent itself acknowledged the risks and for this reason considered carefully whether there had in fact been any collusion. However, even prior to the group being set up WX had relayed her account to a number of people and YZ had relayed her account to IC. The Tribunal did not fully understand the point the claimant was making by his reference to "an all white WhatsApp group" and whether if there

had been “non-white” people in the group, it would have been acceptable. In any event the respondent did not “subject” the claimant to any detriment. Even if it did, the decision to set up the group, or agree on its membership, had nothing whatsoever to do with the claimant's race. This claim fails.

Ms Moore shared confidential information from a 2017 confidential investigation with the second complainant (YZ), in violation of the respondent's Disciplinary Procedure [1.2.4]

100. This is an allegation relating to the sharing of contact information. The Tribunal accepted that there was no evidence that Ms Moore had shared any such information. The Tribunal rejected the suggestion that the claimant had been “subjected” to a detriment. Neither did it accept that any sharing of contact information was in any way connected with the claimant's race.

Ms Daly imposed restrictions on the claimant’s practice prior to the commencement of the MHPS investigation and these were lifted only when the claimant protested [1.2.5]

101. On 13 May 2019, the claimant was informed that there may be a restriction on his practice, not to attend any CTG masterclasses until further notice. The claimant responded setting out reasons why his attendance at CTG masterclasses should not be restricted. He suggested that he would accept a restriction preventing him from taking any other employees to a masterclass. On 14 May 2019, Ms Daly wrote to the claimant stating that the Responding to Concerns panel had agreed that he could continue to attend masterclasses but that he must not involve any current or previous employees in them.

102. The Tribunal could therefore not see how the claimant was subjected to any detriment given that they accepted his proposal. The decision to impose the restriction was not in any way connected with the claimant's race. This claim fails.

Ms Low fabricated WX’s allegations in order to commence an investigation against the claimant to secure the claimant’s dismissal, and to confuse the claimant on the day before the claimant attended an interview with Dr Bown [1.2.6]

103. This has been dealt with at paragraph 85 above. The claim fails for the reasons given.

The respondent commenced an investigation against the claimant in respect of a historic allegation that had already been concluded, after confirming to the claimant in writing in December 2017 that the respondent would not take any further action [1.2.7]

104. The Tribunal concluded that the claimant must have known that there was always a possibility that the WX matter may be re-opened. Whilst an employer must always consider carefully whether to re-open an historic matter such as

this, it was clear that there was good reason to do so. It is arguable that the clinicians, and WX, had been poorly advised by HR in 2017. This resulted in WX not wishing to engage in the process, which in turn resulted in HR advising that the matter could not be taken further.

105. In any event, given the fact that another person had made not dissimilar allegations against the claimant, it was legitimate and reasonable for the respondent to look at the matter again. The Tribunal concluded that this decision had nothing to do with race. Exactly the same decision would have been made had the claimant been white, which is the hypothetical group the claimant seems to compare himself with. For these reasons, this claim fails.

Dr Bown submitted a biased investigation report against the claimant, changed the wording of an allegation to prove the claimant guilty and did not inform the claimant that the final report was altered after submission, in violation of the respondent's Disciplinary Policy [1.2.8]

106. The Tribunal concluded that there was absolutely no basis for suggesting that the report prepared by Dr Bown was biased. The Tribunal accepted that Dr Bown misunderstood her remit by including conclusions on the allegations. These were removed before it was sent to the disciplinary panel. Ms Marsello sought to change small parts of the report, which was more about terminology than anything else. Some of those proposals Dr Bown agreed with, whilst others she did not. There was no breach of the respondent's policies. The claimant was not entitled to be informed about such changes. In any event, none of the changes were made because of the claimant's race; neither was any failure to inform the claimant anything to do with his race. For these reasons, this claim fails.

The respondent's decision to dismiss the claimant and decision at appeal to uphold the dismissal using false reasoning that the claimant had posed a threat to patients or may cause them distress, when the claimant was going to be on planned annual leave from 14 February 2020 [1.2.9]

107. The disciplinary panel decided to reach a decision on the same day as the disciplinary hearing, and was able to do so. Having done so, the respondent decided to dismiss the claimant the next day, providing him with a short dismissal letter, and then sending a more detailed letter a week later. The reason for this was because the respondent was concerned that rumours of dismissal, and details of the disciplinary process, might leak causing potential anxiety to patients.

108. As far as the disciplinary and appeal hearings are concerned, the tribunal did not accept that the decision was based on false reasoning. The decisions made at these hearings were not in any way connected with the claimant's race.

Unfair dismissal

109. The Tribunal concluded that the claimant's employment was brought to an end, not by the claimant, but by the respondent. The claimant gave notice, by letter dated 14 December 2019, of his intention to bring his employment to an end at the end of his notice period on 14 March 2020. His employment therefore continued beyond 14 December 2019 as normal. As we know, there was a disciplinary hearing on 5 February 2020 and the claimant was dismissed on 6 February 2020. That was an intervening event which brought the employment to an end earlier than had been intended by the claimant's resignation. For these reasons, the claimant was dismissed and the claimant's claim is one of unfair dismissal rather than constructive dismissal. This matter was dealt with as a preliminary issue.

110. The first question the Tribunal has to ask itself is whether the respondent dismissed the claimant for one of the potentially fair reasons under s.98 ERA. The Tribunal concluded that it did; the reason for dismissal was the claimant's misconduct.

111. The Tribunal then considered whether the respondent's belief that the claimant was guilty of misconduct was based on a reasonable investigation of the facts. The Tribunal concluded that there was an extremely thorough investigation and disciplinary hearing. Those involved in the process, particularly Dr Bown and Ms Benincasa, were very thorough and took a great deal of time to ensure that the correct decisions were made and that the process was fair to all concerned. The disciplinary panel took the unusual step of hearing from WX and YZ themselves, rather than simply relying on their interviews. The panel did this because of the seriousness of the matter, the potential impact on the claimant, and importantly it provided an opportunity for the panel itself to assess the credibility of WX and YZ. Whilst the claimant alleged collusion, WX and YZ were not questioned by the claimant or his representative about this. It was also clear to the panel that both WX and YZ had provided their accounts to others before speaking to each other. In any event, the Tribunal accepted that the panel considered the possibility of collusion carefully.

112. Whilst there were areas that were identified as learning points, none of those rendered the process unfair. The steps taken by the respondent in terms of the process, and the decision to dismiss, fell well within the band of reasonable responses. There was simply no basis for the Tribunal to find that the dismissal was unfair.

113. Turning to each of the complaints of unfairness, the Tribunal concluded as follows.

Resurrected an historical complaint [2.3.1]

114. The Tribunal relies on its reasons at paragraphs 104 and 105.

The respondent did not investigate WXs complaint in 2015 [2.3.2]

115. Again this is covered within paragraphs 104 and 105. It does not render the dismissal unfair.

Improperly placed restrictions on the claimant in May 2019 [2.3.3]

116. This has already been covered but in any event has nothing to do with the dismissal. The disciplinary panel did not deal with the issue of restrictions.

The respondent failed to properly, fully or adequately investigate the claimant's defence and responses to the allegations or to give sufficient weight to them [2.3.4]

117. The Tribunal rejected this assertion. The disciplinary panel considered fully the claimant's responses to the allegations and gave appropriate weight to them. The fact that the claimant disagreed with the panel's conclusions does not mean they gave insufficient consideration to what he said.

The respondent failed to provide the claimant with sufficient or adequate detail of the allegations or allow him to properly and in good time prepare his response to them [2.3.5]

118. Again, the Tribunal concluded that the claimant was being completely disingenuous. The claimant was provided with a pack of information with a considerable number of pages. It resulted in the claimant producing his own 60 page response. The claimant knew exactly what allegations he needed to answer at the disciplinary hearing. Even if he did not, that was corrected on appeal.

The respondent amended the terms of reference (18 July 2019) of the investigation again on 15 August 2019, after the claimant had submitted his written statement in response, and increased the allegations from 5 to 8 [2.3.6]

119. This did not render the dismissal unfair. The terms of reference were amended well before the disciplinary hearing.

Dr Bown revised her final report and changed the wording of the allegations against the claimant, after she met with the senior management improperly, unfairly and/or to facilitate a finding of guilt against the claimant, and the claimant was not provided with an opportunity to comment on either the 3 or 10 October 2019 reports within 10 days as required by respondent's Disciplinary Procedure [2.3.7]

120. The claimant did not need to comment on the first draft of the investigation report. The disciplinary panel only received the final version. This did not render the dismissal unfair.

The respondent's investigation focused on or provided greater weight to evidence to prove the claimant's guilt, rather than evidence to exonerate the claimant [2.3.8]

121. The claimant was interviewed as part of the investigation. The Tribunal did not accept that there was a focus on proving the claimant's guilt.

The respondent did not apply the same standard of critical analysis and weighing up of evidence to the evidence of the complainants in support of the allegations as the respondent did to the claimant's evidence in defence of the allegations. The respondent applied a higher standard of critique, analysis and credibility to the claimant's evidence than it did to the complainants and evidence in support of the allegations [2.3.9]

122. The Tribunal accepted Ms Benincasa's evidence that the panel looked carefully and critically at the evidence in order to decide whether the claimant was guilty of the misconduct alleged. The Tribunal rejected the suggestion that the disciplinary panel applied a higher standard of critique, analysis and credibility to the claimant's evidence than it did to the complainants.

The respondent failed to give any or adequate weight to the evidence of WX about discrepancies in her own evidence and mistakes in the evidence of others [2.3.10]

123. The Tribunal fully accepted that the panel were aware of the slight differences in the accounts of WX and YZ. This was largely not the fault of the complainants but simply because those taking down their accounts had misheard or misinterpreted what was said. The panel considered that their accounts were largely consistent and rich in detail. The panel was entitled to conclude that their accounts were true and not fabricated.

Hearsay evidence of other witnesses was given greater weight than the claimant's first-hand evidence [2.3.11]

124. It is clear that the panel based their decision on direct live evidence provided at the hearing and on information contained in the investigation report which they were entitled to do.

The respondent failed to adequately or at all to investigate the issue of collusion [2.3.12 and 2.3.13]

125. This has already been dealt with above.

The respondent failed to properly investigate and/or pay sufficient regard to the fact that some witnesses had their own motives or agendas for providing evidence against the claimant [2.3.14]

126. The difficulty for the claimant is that YZ and WX had no motive to lie. The panel was perfectly entitled to reach the conclusions it did.

New evidence from a random hotel guest against the claimant was produced at the disciplinary hearing without any prior warning and without the opportunity for the claimant to challenge its validity or to produce evidence in rebuttal [2.3.15]

127. This was not evidence which played a significant part of the reasoning for the panel's decision to dismiss, as confirmed by Ms Benincasa. In any event, even if the claimant was in any way disadvantaged, the claimant had the opportunity to make any points he wished to make at the appeal hearing. Any procedural unfairness was corrected at that point.

128. Finally during the hearing, another point which the claimant pursued was that he and his representative had been prevented from pursuing what the claimant had suggested was a crucial point in his case. Ms Benincasa was questioned about this. She said that she initially stopped certain questions being asked by the claimant's representative because she thought it related to an allegation that was no longer being pursued. She later realised that she was mistaken and allowed the claimant's representative to ask the questions he wanted to on the issue. The claimant suggests that his representative did not ask any further questions because Ms Benincasa had suggested she would explain the reason for preventing the claimant's representative from asking questions later, and that as she had not provided that explanation, the claimant's representative did not feel he could ask further questions on that issue.

129. The Tribunal concluded that the claimant was simply being disingenuous pursuing this point when both he and his representative knew full well that Ms Benincasa had made an error and quickly corrected this. The claimant and his representative knew they were being allowed to ask questions on the issue but chose not to do so. The Tribunal did not, in those circumstances, consider this rendered the dismissal unfair. In any event, even if it was a procedural defect, it was corrected on appeal.

Wrongful dismissal

130. On the allegations made by WX and YZ, the Tribunal concluded it was more probable than not, that the claimant behaved in the way YZ and WX alleged and which is set out above. They gave such detail that it was difficult to conclude that they had fabricated their accounts, whether at the behest of the respondent or otherwise. The claimant, on the other hand, was not a credible witness in these proceedings, and his defence to the allegations, namely that a few senior colleagues had coerced WX and YZ into making false allegations against the claimant was completely without any evidence. Indeed on the one hand he suggested that they were coerced by senior colleagues, and on the other that they colluded with each other.

131. Having listened carefully to the evidence of witnesses for the respondent, the Tribunal did not believe they would even contemplate doing what is alleged of them. Furthermore, the Tribunal could not understand why senior doctors

would risk their career and reputation by colluding with YZ and WX to make up their accounts, or by pressuring them to do so; there was simply no benefit to them of doing such a career ending and professionally damaging act. The Tribunal recognises that the claimant will say, in a similar vein, why would he do something so serious which was also potentially career ending for him.

132. As we have said before, the panels hearing the claimant's case, both the disciplinary and appeal panels, were entitled to reject the claimant's defence and prefer the accounts of YZ and WX. On the basis of the evidence before this Tribunal, it also preferred the accounts of YZ and WX for the reasons stated above and concluded that, on the balance of probabilities, the claimant committed the serious acts of sexual harassment alleged. The Tribunal further concluded that the claimant failed to comply with the informal advice given to him in 2017 and went on to exhibit the same form of behaviour with YZ. The Tribunal concluded that the claimant breached the implied term of mutual trust and confidence and the respondent was entitled, therefore, to dismiss him without notice.

133. In light of the above conclusions, the Tribunal did not consider it necessary to deal with time limit issues.

134. For the above reasons, all claims fail and are dismissed.

……

Employment Judge Hyams-Parish
08 February 2022

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to Employment Tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX
LIST OF ISSUES

[Numbers in square brackets refer to the amended particulars of claim]

1. Discrimination on the grounds of race

1.1 C is a British Asian (Sri Lankan) and will rely on a hypothetical white consultant working at the Respondent's hospital as the relevant comparator for all of the allegations of race discrimination.

1.2 What are the acts or omissions of R that are alleged to constitute discrimination on the grounds of C's race?

C will contend the following are acts of discrimination against C on the grounds of his race:

1.2.1 Jessica Moore and Karen Daly colluded against C to ensure C's dismissal as follows:

a. 2017 - Jessica Moore colluded with Mark Gammage, HR manager, to commence an investigation against C following complaints by WX, and she expressed her concern that, "the only thing would be if at the end of an investigation it was found that what she was saying was completely unsubstantiated then there may be some potential I think risk in terms of it was completely made up story," but she was reassured by the Mr Gammage that, "The Trust would support her" [point 21(m)];

b. May 2019 - Karen Daly improperly stated to one of the complainants that there was 'credible evidence' that C's behaviour was inappropriate, even prior to the commencement of the MHPS investigation, without proper foundation or basis [point 21(a)];

c. 14 May 2019 - Karen Daly imposed another unfair restriction on C stating, "you must not have any communication (verbal, written by e mail or any other means) with any member of St George's staff with the exception of essential communication about patient care. This includes individuals who are no longer members of St Georges staff". This prevented C discussing the situation and expressing any concerns with staff in R's employ, the Freedom to Speak Up Guardian or a Non-Executive Director [point 21(n)];

d. August 2019 - Jessica Moore made a malicious allegation to tarnish C's reputation during her Disciplinary investigation interview that C de-stressed "by having lots of sex", without any evidence or logical basis, and this breached R's Dignity at Work Policy, meriting a Disciplinary Investigation against Ms Moore. [point 21(k)];

e. August 2019 – Jessica Moore had lied at her interview by stating that the investigation did not find any evidence that her close friend Mr Paul Bulmer made racist remarks, whereas the investigatory panel had in fact found sufficient evidence against him [point 21(l)];

1.2.2 Jessica Moore repeatedly requested C to step down as the Labour Ward Lead Consultant without providing any valid reasons during C's Job Planning on 23 March 2018 and 10 July 2019. Ms Moore, by an email on 23 March 2018, attempted to curtail the Regional Service for Abnormal Invasion of the Placenta which C led. R's senior management, by an email on 22 March 2018, unfairly expected C to personally provide a 24/7, high risk complex service when C's colleagues were permitted to have a "team-approach" when they ran any regional referral service [point 21(i)];

1.2.3 Jessica Moore was part of an all White WhatsApp chat group with both the complainants, against the R's policy, and the expected code of practice of R's senior managers, as confirmed by Alison Benincasa during the Appeal Hearing [point 21(h)];

1.2.4 April 2019 - Jessica Moore shared confidential information from a 2017 confidential investigation with the second complainant (YZ), in violation of R's Disciplinary Procedure. Disclosure of confidential information breached the Data Protection Act, the GDPR and according to the R's Disciplinary Policy, it constituted "Gross Misconduct" meriting a summary dismissal. Ms Moore also shared the contact details of a previous complainant (WX) from 2015 to the second complainant (YZ) in April 2019, despite the full knowledge that R had informed C in writing in December 2017 that C had no case to answer in respect of WX's written complaint in October 2017 and that R would not investigate it any further [point 21(g)];

1.2.5 13 May 2019 - Karen Daly imposed restrictions on C's practice prior to the commencement of the MHPS investigation and these were lifted only when C protested. This act also breached the Terms and Conditions of C's Consultant Contract [point 21(b)];

1.2.6 14 June 2019 - Claire Low fabricated WX's allegations in order to commence an investigation against C to secure C's dismissal, and to confuse C on the day before C attended an interview with Stephanie Bown so that C's account of events could be considered as "not credible", and "inconsistent" as compared to the accounts of the complainants [point 21(d)];

1.2.7 August 2019 - R commenced an investigation against C in respect of a historic allegation that had already been concluded, after confirming to C in writing in December 2017 that R would not take any further action [point 21(c)];

1.2.8 October 2019 – Stephanie Bown submitted a biased investigation report against C, changed the wording of an allegation to prove C guilty and did not inform C that the final report was altered after submission, in violation of R's Disciplinary Policy [point 21(e)]; and

1.2.9 6 February 2020 and 7 August 2020 – in the event that there was no constructive dismissal, R's decision to dismiss C and decision at appeal to uphold the dismissal using false reasoning that C had posed a threat to patients or may cause them distress, when C was going to be on planned annual leave from 14 February 2020, and subsequently conceded during the Appeal Hearing that C had posed no such threat to patients [point 21(f)].

1.3 Has C brought his claim in respect of the above allegations of discrimination within time, taking into account any extension of time for taking part in Acas Early Conciliation, and, if not, would it be just and equitable to extend the time limit for C to do so?

1.4 Has C proven facts from which the Tribunal could draw an inference of discrimination on the grounds of race by reference to the above comparator(s), notwithstanding R's explanation?

1.5 If so, can R show reasons that are not in fact discriminatory for the relevant acts and/or omissions?

2 **Unfair Dismissal**

2.1 Was C's employment terminated due to his resignation or his dismissal for gross misconduct? R will contend C resigned on 14 December 2019 with three months' notice.

C was summarily dismissed on 6 February 2020 due to gross misconduct, and that is the date and reason for the termination of his employment.

C will contend that he intended to work at St George's University Hospitals NHS Foundation Trust until the age of his retirement, and he was forced to submit his resignation only because he felt unable to do so physically and psychologically due to the toxic environment created by the Trust.

2.2 If C's employment was terminated due to his dismissal for gross misconduct, did R have a fair reason to dismiss C?

R will contend it dismissed C due to findings of gross misconduct.

C will contend the following:

2.2.1 R did not, nor could it have had, a genuine belief in C's misconduct, based on, inter alia, the speculative, historic and contradictory evidence against C, in contrast to C's evidence in rebuttal [point 25(a)];

2.2.2 R did not have a sufficient, reasonable or fair basis to conclude that C was guilty of the misconduct alleged against him [point 25(r)];

2.2.3 The Chat messages from the all-White What'sApp Group which were disclosed to C confirm that both the complainants and their witnesses were not only colluding with each other regarding what information should be included in their individual signed Witness Statements following their investigatory interview, they were also colluding to provide false information to the Trust to have C suspended from the hospital in August 2019 [point 32];and

2.2.4 Further or alternatively, R dismissed C due to his race [point 25(r)]

2.3 Did R follow a fair procedure in dismissing C?

R will contend it followed a fair procedure in dismissing C

C will contend R failed to conduct a fair investigation (both procedurally and substantively) [point 25(b)] for the following reasons:

2.3.1 Resurrected an historical complaint in 2019 of alleged sexual misconduct in October 2015, which was dealt with and concluded informally in December 2017, converting the same into a formal allegation of gross misconduct [point 25(c)];

2.3.2 Failed to investigate adequately or at all, the initial allegation in October 2015 or to provide C with an opportunity to properly and fully respond to the allegation, despite confirming in December 2017, in writing, that the Trust would not investigate the matter further, thereby prejudicing C when the allegation was formally investigated almost three years later [point 25(d)];

2.3.3 Improperly placed restrictions on C in May 2019, and lifted them after the claimant complained, suggesting a pre-determination of C's guilt [point 25(e)];

2.3.4 R failed to properly, fully or adequately investigate C's defence and responses to the allegations or to give sufficient weight to the same [point 25(f)];

2.3.5 R failed to provide C with sufficient or adequate detail of the allegations against C to allow him to properly and in good time prepare his response to them [point 25(g)];

2.3.6 R amended the terms of reference (18 July 2019) of the investigation again on 15 August 2019, after C had submitted his written statement in response, and increased the allegations from 5 to 8 allegations [point 25(h)];

2.3.7 Stephanie Bown revised her final report and changed the wording of the allegations against the claimant, after she met with the senior management improperly, unfairly and/or to facilitate a finding of guilt against the C, and the C was not provided with an opportunity to

comment on either the 3 or 10 October 2019 reports within 10 days as required by the R's Disciplinary Procedure [point 25(i)];

2.3.8 R's investigation focused on or provided greater weight to evidence to prove the claimant's guilt, rather than evidence to exonerate C [point 25(j)];

2.3.9 R did not apply the same standard of critical analysis and weighing up of evidence to the evidence of the Complainants in support of the allegations as R did to C's evidence in defence of the allegations. R applied a higher standard of critique, analysis and credibility to C's evidence than it did to the complainants and evidence in support of the allegations [point 25(k)];

2.3.10 R failed to give any or adequate weight to the evidence of WX about discrepancies in her own evidence and mistakes in the evidence of other [point 25(l)];

2.3.11 Hearsay evidence of other witnesses was given greater weight than C's first-hand evidence [point 25(m)];

2.3.12 R failed to adequately or at all to investigate the issue of collusion between the complainants and disregarded or paid inadequate consideration to the fact they had both discussed their allegations with each other [point 25(n)];

2.3.13 R failed to adequately or at all to investigate the issue of collusion between the complainants and other witnesses and/or collusion between the other witnesses, despite C's email to the Case Manager on 10 October 2019 [point 25(o)];

2.3.14 R failed to properly investigate and/or pay sufficient regard to the fact that some witnesses had their own motives or agendas for providing evidence against C [point 25(p)]; and

2.3.15 New evidence from a random hotel guest against C was produced at the disciplinary hearing without any prior warning and without the opportunity for C to challenge its validity or to produce evidence in rebuttal [point 25(q)].

2.4 Was dismissal within the reasonable band of responses available to R and was the dismissal fair in all the circumstances?

R will contend its decision was within the reasonable band of responses available to it and the dismissal was fair in all the circumstances

C will contend R failed to take any or sufficient account of C's mitigation; Alison Benincasa reviewed the 1000 page bundle of documents four days prior to the hearing and she did not see the letter sent out on her behalf setting out the

incorrect allegations against C [point 25(s)]; and she had conceded at the Appeal Hearing that the complainant's witness statement was inconsistent, contrary to what she had concluded in the Disciplinary Outcome Letter [point 30(i)(i)].

C will contend that he was treated unfairly and differently compared to a White consultant in his own department, when sufficient evidence was found that he had breached R's Disciplinary Policy meriting a summary dismissal. However, C was summarily dismissed without any evidence and without any informal, formal or final formal warning [point 22].