EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100328/17

5 **Held in Glasgow on 18, 19, 22, 23, 24, 25, 26, January 2018 and 1 February 2018, with Members Meeting on 2 February 2018**

Employment Judge: **Claire McManus**
Members: **Mr I Ashraf**
10 **Ms M McAllister**

Dr S Das **Claimant**
15 **Represented by:**
Mr D Hay
(Advocate)

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Lanarkshire Health Board **Respondent**
Represented by:
Mr A Hardman
(Advocate)
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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The unanimous Judgment of the Tribunal is that:-

- The claimant's claim under Section 103A of the Employment Rights Act 1996 is unsuccessful and is dismissed.

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- The claimant's claim for constructive dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful and is dismissed.

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REASONS

Background

1. An ET1 application claiming unfair dismissal was made on behalf of the claimant against the Respondent on 25 February 2017. Amended Particulars of the claim were later accepted. The claimant had complied with the requirement under the Employment Tribunals Act 1996 Section 18A to contact ACAS before instituting these proceedings. The claim was acknowledged, the ET1 form sent by the Employment Tribunal office to the respondent and an ET3 form was lodged in response to that complaint on DATE 2017. Amended Grounds of Resistance were later lodged.

2. The case was scheduled to proceed to a full Hearing on Monday 15 January 2018 and thereafter 18, 19, 22, 23, 24, 25, 26 and 29 January and 1 and 2 February 2018. Proceedings in this case on 15 January are set out in the separately issued Note of Discussions before the Employment Tribunal on 15 January 2018 and Order of the Employment Tribunal dated 16 January 2018. The hearing then proceeded from 18 January, with use of witness statements and proceeding in line with that issued timetabling Order. The Tribunal was grateful to parties' representatives for their cooperation in that regard and in ensuring that this hearing was completed within the allocated dates.

3. Parties' representatives had helpfully liaised to prepare a Joint Bundle. This was set out in two volumes with consecutively numbered pages. The numbers in brackets in this Decision refer to the page numbers in these bundles. Not all documents were referred to in evidence. Evidence was heard on oath or affirmation from all witnesses. All witnesses adopted their own witness statement as their evidence before this Tribunal. There then followed some questions for each in examination in chief, followed by considerable cross examination, then questions from the Tribunal and re-examination. For the claimant, evidence was heard from the claimant only. For the respondent, evidence was heard from Dr Brian MacInnes (Clinical

Lead in Stroke Medicine and Geriatrics at Hairmyres Hospital); Dr Brian McGurn (Deputy Clinical Director for Medical Specialities (including Care of the Elderly) at Hairmyres Hospital); Dr Graham Ellis (Associate Medical Director for Older People); Dr Helen Mackie (former Chief of Medical Services, Hairmyres Hospital); Dr Jane Burns (Divisional Medical Director, Acute Division, Lanarkshire Health Board); Mr Callum Campbell (Chief Executive, Lanarkshire Health Board) and Mr Kenny Small (Director of Human Resources, Lanarkshire Health Board).

4. Evidence was concluded on 26 January 2018. The case had been fixed for further hearing days on 28 January, 1 and 2 February. The hearing on Monday 28 January was discharged. It was agreed that both parties' representatives would speak to their written submissions on Thursday 1 February and that was done, with a Members' Meeting on Friday 2 February.

Issues for Determination

5. The issues determined by the Tribunal are those agreed by parties' representatives as being the issues for determination, as set out in the Note of proceedings on 15 January. These are as follows:-

   (i) Did Dr Das resign because of conduct by the respondent?

   (ii) If so, what was that conduct which caused Dr Das to resign?

   (iii) Was that conduct calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?

   (iv) If so, did the respondent conduct itself in such a manner without reasonable and proper cause?

(v) Did Dr Das raise certain protected disclosures?

(vi) If so, what were they, and when were they raised?

5 (vii) Was any such disclosure the reason, or principle reason, for the claimant's constructive dismissal?

(viii) What loss did Dr Das suffer arising from his resignation?

10 6. Also as set out in that Note of proceedings on 15 January, the claimant's representative advised the Tribunal that the matters being relied upon by the claimant as protected disclosures are set out in paragraphs 8 & 9 of the amended ET1 (at page 20 of Volume 1 of the Joint Inventory) and are said to have been raised in July 2015 and repeated in the claimant's complaint 15 about bullying made in January 2016 and set out at paragraph 12 of the Amended Particulars of the claim ET1 (page 21), with reference to the matters set out in the Judgment of the Employment Tribunal in the claimant's claim against Ayrshire & Arran Heath Board, dated 27 June 2014, in particular at paragraphs 130 - 133. It was confirmed that that 20 bullying complaint is not relied on itself as a protected disclosure. It was confirmed that it is these alleged protected disclosures which are relied upon as the basis of the claimant's constructive dismissal claim.

7. Following correspondence from the Tribunal to parties' representatives sent 25 on EJ McManus' request after the commencement of proceedings on 18 January, the claimant's representative confirmed that there was not a separate claim being made for detriment under Section 47 of the ERA arising out of the claimant having made an alleged protective disclosure, on the basis that it was accepted that nowhere in the ET1 is there a case pled 30 under Section 47. It was accepted by the claimant's representative that there was then no head of claim for *solatium,* the claims being only for automatic unfair dismissal under Section 103 A, *esto* constructive dismissal.

8. It was confirmed by the claimant's representative during the course of proceedings that no claim for victimisation was brought by the claimant against the respondent.

5 **Findings in Fact**

9. The Tribunal made findings in respect of facts which were material to the issues for determination by this Tribunal. The following material facts were admitted or found by the Tribunal to be proven:-

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(a) The claimant is a Speciality Doctor in medicine for the elderly with special interest in the stroke medicine. The role of Speciality Doctor is generally a separate career route to that of Consultant. Speciality doctors and consultants are both 'Career Grades'. Speciality doctors 15 can work at different levels, depending on their experience and the stage of their career. More experienced speciality doctors at the highest level of the grade may be more clinically experienced than their consultant colleagues, but the role of consultant is always more senior to the role of speciality doctor. The supervising consultant has 20 ultimate clinical responsibility for their patients. The claimant is at the top level of the speciality doctor pay scale. He can work independently.

(b) Consultants and speciality doctors work on the basis of sessions. 25 Each session is a period of four hours. A standard full time job for a speciality doctor is 10 sessions (40 hours) working Monday to Friday 9am to 5pm each day. Normally, 9 of those 10 sessions is for direct clinical care ('Programmed Activity' or 'PA'), with one session of 'Special Programmed Activity ('SPA'), when activities such as 30 training, appraisal and meetings can take place. The career route of speciality doctor is often chosen by an individual who wishes to specialise in a chosen field of medicine but does not wish to work on-call or at weekends. The claimant chose the career grade route of

speciality doctor because he wished to achieve a good work / life balance and he wished to be able to devote time to his role as a parent.

5 (c) The Respondent is an NHS Health Board with approximately 12,000 employees. In 2012 the respondent advertised a vacancy stated as being for a 'Locum Speciality Doctor (Fixed Term for 1 year) at Hairmyres Hospital, East Kilbride, Lanarkshire. That advert is at Doc 191. The 'Overview' of the post is stated in that advert as:-

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> 'Applications are sought for the post of speciality doctor within a dynamic and growing department of medicine for the elderly. The post supports the work in the Specialist Stroke service and Comprehensive Geriatric Assessment. The post forms
> 15 part of the medical team including seven consultants, one associate specialist and one additional Locum Speciality post.'

The 'Description' of the post in that advert was:-

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> 'The successful candidate is expected to provide medical supervision within the specialist stroke ward on the acute site. Working closely with two supervising consultants, he/she will also support fast track TIA / stroke outpatient clinics and will work with a multidisciplinary team and be able to provide
> 25 acute advice/assessment to patients admitted outside the stroke unit. Opportunities to learn the skills and knowledge to deliver acute stroke treatments can be made available to the successful candidate.'

30 (d) The claimant became aware of this advert and made enquiries about this role. At the time of enquiring about this advert the claimant was employed under a permanent contract of employment. The claimant was employed by NHS Greater Glasgow and Clyde, working in

orthogeriatrics in Paisley. The claimant was attracted by what he saw as an opportunity to work as a speciality doctor in Geriatrics within his chosen speciality of stoke.

5 (e) At the time of that vacancy being advertised, Dr Brendan Martin held the position of Clinical Director. At that time, Dr Brian MacInnes had no formal managerial role but had held the position of Consultant at Hairmyres Hospital since 2004 and his duties included management issues such as dealing with rotas. Dr MacInnes was involved in the
10 recruitment process which led to the claimant being employed by the respondent.

(f) Prior to the vacancy being advertised, the respondent had placed adverts for a Staff Grade doctor working in the Day Hospital. Despite
15 that being advertised twice, there were no applicants. It was decided that an advert be placed for a new role of Speciality Doctor in Geriatric Medicine and Stroke. It was envisaged by Dr MacInnes that the template for that new role would be a Speciality Doctor role in Wishaw, where the doctor carried out a ‘roving role’, seeing patients
20 in the receiving unit and the stroke unit and patients in the Day Hospital with suspected mini strokes (TIAs).

(g) The claimant made enquiries about the vacancy with the respondent’s HR department. The claimant did not have sight of the
25 information pack in respect of the role at the time of applying (although one was later produced, which is at Doc 192 - 198). The claimant spoke on the phone to Dr Brain MacInnes in respect of the advert at Doc 191. They discussed in principal what the role would be. Dr MacInnes explained that it was a new post. The claimant
30 understood from his discussions with Dr MacInnes that the respondent was looking for someone who was an experienced, senior, specialist doctor, who would be based in the stoke unit and

who would cover the functions of the role of consultant when required.

(h) The claimant was concerned that the vacancy was for a temporary locum post and was not a permanent post. The claimant discussed this concern with Dr MacInnes in their phone call and asked if the intention was for the post to be made permanent. Dr MacInnes made enquiries about funding for a permanent post. Dr MacInnes informed the respondent's then Clinical Director, Dr Brendan Martin about his conversation with the claimant and the claimant's concern over the post being a temporary one. There was email correspondence between Dr Martin and Dr MacInnes about the claimant's query re the post being made permanent Dr Martin then emailed David Hume (then Hospital Manager) asking if the role could be made permanent. The response from David Hume was that there was permanent funding for the role. There followed emails between Dr Martin and Marlene Fraser (Head of Medical Staffing) re there being two options, being (1) re- advertising the role as being a permanent role (2) interviewing the claimant and re-advertise the role as permanent at a later time. It was decided to proceed with interviewing the claimant, on the basis that the role would be advertised as a permanent role at a later date. The emails reflecting this series of events are at Docs 538 - 551. The job was not later advertised as a permanent post.

(i) The claimant was interviewed by Dr Martin, Dr MacInnes and Ruth Broadfoot (HR Representative and Assistant to Marlene Fraser). At the interview, the claimant was told that permanent funding for the post had been secured and that the post would be re-advertised as a permanent role 'at some point down the line'. At interview there was some discussion about requirements to work on-call rota. The claimant's position at his interview was that he would have a difficulty with being on-call because he had enrolled in part time University

course (studying law) and because he and his wife were carers for the claimant's elderly parents. There was no agreement at interview on the detail of any on-call requirements in this role. The claimant's position at interview was that he would be leaving a permanent post to take a fixed term locum post only on the basis of the prospect of that post being made permanent and so he expected 'pay protection' rather than the weekly locum pay stated in the advert. There was discussion at the interview about the duties of the role. The claimant was told that he would be expected to 'pop in' to the Continuing Care ward. The claimant expected that to mean that he would be the senior doctor who would address any issues in that ward and that those duties would take approximately an hour in each afternoon.

(j) The claimant was offered the post of Locum Speciality Doctor - Care of the Elderly, Hairmyres Hospital. The claimant initially declined a verbal offer because his position was that he could not commit to on-call. Following a discussion between the claimant and Dr MacInnes about this, the claimant received a written offer. The claimant declined this offer because it was in the basis of the locum weekly pay. A further written offer was made, with protected pay scale. The claimant accepted this offer of employment. He resigned from his permanent post at Royal Alexandria Hospital. Paisley, giving three months' notice. An important factor in the claimant deciding to leave his permanent post in Paisley and him accepting his position with the respondent was that he considered himself to be primarily a stoke physician and he wished to work in stroke medicine.

(k) The claimant commenced at Hairmyres Hospital in October 2012. The claimant received a 3 month contract for 11 sessions, with a weekend supplement. The claimant considered the 3 month period to be an error and returned the contract with this period amended to one year. The claimant was paid for 10 sessions. There were further discussions between the claimant and Dr Madness in respect

of any requirement for the claimant to work 'on call'. It was agreed that the claimant would work 10 sessions, 9am to 5pm, Monday to Friday, with no on call requirement and this was reflected in the claimant's pay, which was for 10 sessions with no weekend work.

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(l) The claimant had previously been employed by Ayrshire and Arran Health Board and had made an Employment Tribunal claim against that Health Board, claiming that he had suffered a detriment as a result of making a protected disclosure and victimisation. That position was the claimant's first post in the non-consultant career grade. The claimant qualified in medicine in India in 1989. He has worked in Scotland since 1996. Prior to joining the respondent, the claimant had experience working in Geriatrics and Stroke, including working in a Geriatric Continuing Care ward. After leaving Ayrshire and Arran the claimant worked in orthogeriatrics in Edinburgh and then in Paisley. The claimant left the job in Edinburgh to be closer to his family home in Cumnock, Ayrshire.

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(m) A Job Plan is an important document for a doctor. The Job Plan sets out the doctor's duties in their role in terms of Programmed Activities (*PA's). The Job Plan should set out the planned timetable for activities, or sessions. Each 'session' is for 4 hours. 10 PAs or sessions represents working 9am to 5pm Monday to Friday, or equivalent. Consultants and Speciality doctors normally have 9 sessions (also known as 'Programmed Activities' or 'PA's) for direct clinical activities and 1 session for Special Programme Activities ('SPA'), such as carrying out continuing professional development, education, doing appraisals, etc.

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(n) In November 2012 the claimant raised with Dr Martin his concerns about his duties covering Ward 18 (which at that time was physically based in a separate building, Ward 15, during refurbishment work). The claimant requested job planning to address his concerns about

his duties. There was no agreed Job Plan with the claimant when he commenced his employment with the respondent. The claimant raised this issue with Dr Martin. Dr Martin's position to the claimant was that he did not require a Job Plan because he was in a locum
5 post. Job Plans apply to all doctors, regardless of whether they are contracted on a temporary or permanent basis. Dr Martin took no steps to agree a Job Plan with the claimant. Dr Martin was approaching his retirement and did not properly address certain administrative functions of his role as Clinical Director in the months
10 proceeding his retirement. There was no handover meeting with Dr MacInnes or Dr Ellis to discuss outstanding administrative issues on Dr Martin's retirement.

(o) The needs of the service were such that the advert for the vacancy
i 5 which the claimant had applied for was different from the role actually carried out by the claimant. Although the advert did not explicitly state so, the claimant had expected to be based in the stroke unit. The claimant was not based in the stroke unit. The claimant's contact with patients who were suspected of having had a stroke was
20 in respect of referrals from other wards when the claimant was required to assess patients for possible admission to the stoke unit. Such assessments caused some practical difficulties for the claimant because he did not work in the stroke unit and therefore did not know the situation with regard to availability of beds in that unit. The
25 claimant was frustrated that he was not based in the stroke unit, where he thought he would be. The claimant ran a TIA clinic. TIAs are known as 'mini-strokes'. Otherwise, the claimant's clinical duties were mainly in the Continuing Care Ward (Ward 18, although that ward was for a time physically based in Ward 15, due to
30 refurbishment work taking place).

(p) As well as being concerned that the duties he was expected to carry out in his role were not reflective of the advertised role he had

applied for, and that there was no Job Plan for his role, the claimant was concerned about the insecurity of being employed under a 3 month fixed term contact. In January 2013 the claimant was issued a contract for a further 3 month period. The claimant approached Dr Martin regarding the post being advertised as permanent. Dr Martin told the claimant that the post would not be advertised as a permanent post due to a 'service review'. Although permanent funding had been secured for the post, no action was taken prior to Dr Martin's retirement to change that post to a permanent post. The claimant continued to be employed under a series of fixed term contracts of 3 months. The claimant felt insecure because of this situation. In June / July 2013 the claimant was concerned that, as he understood it, another speciality doctor was 'acting up' as Consultant.

(q) In the period from August 2013 the claimant carried out his annual appraisal with a consultant based at Wishaw hospital. In this appraisal process it was identified that there was no job plan in place in respect of the claimant's role. Following the appraisal process, the claimant approached Dr Martin regarding formal job planning. No action was taken by Dr Martin in respect of agreeing a Job Plan for the claimant.

(r) Around May - June 2014, Dr Martin retired and there was a change in the respondent's medical management structure relevant to Hairmyres Hospital. Dr Martin used annual leave to work on a part time basis in his post as Clinical Director in the month or so prior to his retirement. The change to the respondent's medical management structure in 2014 meant that change was made to three hospital sites. Dr Brian MacInnes became Clinical Lead Consultant in Hairmyres. Dr Brian McGurn became Deputy Clinical Director. Dr John Keaney became Clinical Director for Hairmyres Hospital. Dr Graham Ellis became Associate Medical Director for Older People and had professional and clinical line management responsibilities

for Dr Keaney and Dr McGurn, although Dr Ellis is not based at Hairmyres. Dr Helen Mackie is Chief of Medical Services at Hairmyres Hospital. Both Dr Ellis and Dr Mackie are line managed by Dr Jane Burns (Divisional Medical Director). Dr Burns reports to Iain Wallace (Medical Director), Iain Wallace, Kenny Small (Director of Human Resources) and Heather Knox (Director of Acute Services) report to the Chief Executive (Cal urn Campbell).

(s) There was no clear demarcation of the management responsibilities in respect of the claimant following the change in medical management structure in 2014. There was a different management structure in respect of 'operational and governance' matters as opposed to 'strategic and professional' matters. It was not clear to the individuals involved with the claimant who had responsibility for approval of renewal of his fixed term contracts or for deciding that a fixed term post should be made a permanent post upon permanent funding being secured. Emails were sent by individuals in HR about this matter to Dr MacInnes, Dr McGurn, Dr Keaney, Dr Ellis and Dr Mackie. The position of this medical management was that the claimant was an important part of the clinical team and that his contract should be renewed. There was no indication from this medical management in their correspondence to HR representatives about renewal of the claimant's fixed term contracts that there was any wish for the claimant's employment with the respondent not to continue. The claimant was referred to as an important part of the team.

(t) In June 2014, the respondent advertised a permanent General Speciality Doctor post. The claimant discussed the role with Dr McGurn. Dr McGurn is a Consultant Geriatrician. Until June 2014, when he became Deputy Clinical Director, Dr McGurn had no formal leadership or management role. Dr McGurn told the claimant that this advertised role was a general role, not a stroke speciality role.

The claimant did not apply for this role because he understood that the role he was working in would be made permanent. The claimant's email to Dr McGurn of 25 July 2014 reflects this (Doc 389).

5 (u) The claimant's Employment Tribunal claim against Ayrshire and Arran Health Board was heard before an Employment Tribunal in February and May 2014. The Judgment in respect of the claimant's claim against Ayrshire and Arran Health Board is at doc 1198 - 1259 and is dated 27th June 2014. The claimant was successful in his
10 claim of unlawful victimisation contrary to the Equality Act 2010. His claim under section 47B of the Employment Rights Act 1996 (for detriment by reason of having made a protected disclosure) failed and was dismissed.

15 (v) In December 2014, Ruth Broadfoot (HR - Medical Staffing) raised with Dr Ellis and Dr MacInnes that the claimant was 'in as a locum and has been since 12/10/12 therefore he has employment rights.'. She also stated 'I thought the department were keen to make him permanent.' Dr MacInnes replied We are - does he just covert to
20 permanent?' (emails of 29 December 2014 at Doc 637). The position of HR was that the post would have to be advertised before being made permanent and that the claimant would be advised of this and invited to apply (emails at Doc 636). The post was not then advertised.

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(w) The claimant remained concerned at the insecurity of being employed under a series of fixed term contracts. The claimant remined concerned about the duties he was expected to carry out for the respondent. The claimant remained concerned that those duties
30 were significantly different from those described in the job advert for the vacancy for which he had applied. The claimant remained concerned that he was not working within the Stroke Unit. He was concerned that he would lose his skills in respect of working with

patients who had suffered a stroke. These issues were a material factor in tensions developing between the claimant and the Consultants in Ward 18.

5 (x) The range of duties which the claimant was expected to carry out in Ward 18 encompassed duties which required the claimant to work to the 'top of his licence' as a specialist doctor, such as taking clinical decisions on treatment and some duties which may be carried out by a more junior doctor. The duties which the claimant required to
10 undertake in Ward 18 included discussions with patients' families, administrating IV antibiotics, and dictating discharge letters, including death certificates. There was no phlebotomist based in Ward 18 and so the claimant was often required to take bloods. The claimant was concerned that he was required to determine cause of death for the
15 purposes of a death certificate in circumstances where he had little knowledge of the patient because they had only recently been transferred to that ward. He was concerned that he was expected to complete forms re. AWI ('Adults with Incapacity') and DNACPR ('Do Not Attempt Cardio Pulmonary Resuscitation) in circumstances when
20 he believed that they should have been completed at an earlier stage of the patient's journey to Ward 18 e.g. in other wards before the patient was transferred to ward 18.

(y) During the course of the claimant's employment with the respondent,
25 the needs of the service changed. Ward 18 changed from being solely for patients requiring end of life and palliative care to including patients awaiting assessment for transfer to a nursing home or some other care facility.

30 (z) The claimant considered himself to be more clinically experienced than the two consultants in Ward 18, Dr Duffty and Dr Peacock. The claimant referred to Dr Duffty and Dr Peacock as 'very junior' (Doc 724 - 725). The claimant's perception of Dr Duffty and Dr Peacock

as 'very junior consultants' was a reason for and a material factor in the tensions and interpersonal issues developing between the claimant and those consultants.

5 (aa) The claimant continued to be concerned that he did not have an agreed Job Plan in place in respect of his role with the respondent. The first substantive discussions about the content of a Job Plan for the claimant were between the claimant, Dr MacInnes and Dr McGurn in February 2015. There was discussion on the proposed / 10 model job plan at Doc 221 - 222). At this meeting the claimant discussed his concerns in respect of having been employed under a series of fixed term contracts. He was given no explanation for this. The claimant raised his concerns that the duties of his role were substantially different from those reflected in the job advert. There 15 was also discussion on the claimant's concerns about lack of office space and facilities and being expected to dictate discharge letters. When a patient is discharged to the care of their GP, a discharge letter requires to be dictated regarding the processes followed in hospital, clinical scenarios, management plan and noting discharge 20 medication. The claimant was clear at this meeting that he wanted to work in his specialist interest of stroke. No agreement was reached during the course of the claimant's employment about the content of a Job Plan for the claimant. A material factor in no agreement being reached was that the needs of the service were that the duties which 25 the respondent required the claimant to carry out were different to the duties of the advertised role which the claimant had applied for because he was not based in the stroke unit.

(bb) It is intended that a Job Plan will reflect discussions between a doctor 30 and their line manager in respect of the duties of the role. The job plan programme was designed to articulate the current requirements of the role and provide meaningful development of the individual as well as servicing patient care in the organisation. Some Job Plans

are more detailed than others in terms of setting out what duties require to be carried out within particular PA sessions. There is an expectation of flexibility, according to the needs of the service. The respondent has a duty to deliver patient care using all resources in a flexible manner. Doctors are always expected to work to the needs of the service and there may be occasions when their Job Plan is not reflective of the duties actually being carried out by them. The respondent's process in respect of seeking agreement to a Job Plan is for discussion between the doctor and their clinical line manager. If there are any issues of concern, then those should be raised with the next senior clinical lead. After June 2014, Dr MacInnes and Dr McGurn were the appropriate individuals for the claimant to discuss his Job Plan with. The respondent has a medication process which can be used to seek to resolve disagreement on the content of a job plan, and an option for appeal of that mediation outcome. Ultimately, it is for the respondent to determine what the needs of the service are. There was no agreement reached with the claimant on the content of his job plan during the course of his employment with the respondent.

(cc) In September 2014 Lynn Cliens (HR Assistant) contacted Dr McGurn and Dr Keaney stating that she was updating records and asking if Dr Das' contract should be extended for a further 3 months. Dr McGurn replied 'Yes please Lynn. I will speak to John, but Das has been here a while and the service would fall apart without him - I think we need to make the post permanent.' (emails at Doc 628)

(dd) In November 2014, the claimant had his annual appraisal. The appraiser was not based at Hairmyres Hospital. The appraisal documents are at Docs 629 - 634).

(ee) On 24 March 2015, the claimant sent an email to the respondent's Chief Executive, Calum Campbell (Doc 667). He made it clear in this

email that he was not writing about an employment issue, but wanted to meet Mr Campbell to discuss how he could contribute positively to the organisation in terms of patient safety. There was further email correspondence between the claimant and Mr Campbell on 23 - 24 June 2015 (Doc 705 - 707), 6 August 2015 (Doc 714 - 715) and 15 - 16 September 2015 (Doc 722). In these emails the claimant showed his interest in legislation offering protection for those employees who make protected disclosures, including him making public presentations at HR and Audit Scotland events. The emails are in friendly, personal terms.

(ff) There were tensions between the claimant and the two consultants on Ward 18. One of the areas of tension was around the claimant not dictating discharge letters (as reflected in email correspondence of 15 April at Doc 688, where the claimant stated in a reply to Dr Duffty:- 'I'm sorry. I do not do the discharges for ward 18. It was discussed during my job planning but nothing in this regard has been agreed and signed off.' Dr Duffty later referred to her work relationship with the claimant as the reason for her resignation.

(gg) In April 2015 the claimant was in email correspondence with Ruth Broadfoot (HR Advisor). He stated in his email to her of 15 April 2015 (Doc 692) 'I had a discussion with the Clinical Lead (Dr MacInnes) and I explained that the job plan does not reflect my actual job and also other issues, office accommodation, etc'. The claimant said that he had been trying to contact Dr Keaney's secretary re this and ended 'I feel I am constantly being bullied and harassed on doing discharge letters, etc despite having clarified my position to consultants several times. Firstly I do not understand how they came to know about what was discussed in my job planning even before it was signed off.' Ruth Broadfoot told the claimant that he could refer a dispute on job plan for mediation and suggested that this would be Dr Keaney or Dr Mackie and that there was an appeal

stage following that mediation. The claimant asked for Ruth Broadfoot's view on him speaking to Dr Ellis 'before formal appeal / mediation'. Her reply was to encourage him to take further advice.

5 (hh) On 20 April 2015 the claimant sought a meeting with Dr Ellis (Associate Medical Director for Older People) (email correspondence at Doc 693). He stated 'I wonder if it would be possible to meet with you next time you are at HM and have a brief discussion in confidence. You may be able to guide me. (I have been working at 10 HM since October 2012 as a Speciality Doctor but never had the opportunity to meet you).' The claimant gave no indication to Dr Ellis before or at his meeting with him that he intended to raise issues which were protected disclosures. The claimant and Dr Ellis had not met prior to this. When replying to the claimant, Dr Ellis told the 15 claimant that the respondent had advertised a permanent speciality doctor post in Monklands Hospital. Dr Ellis stated in his email to the claimant (Doc 693). 'We have not advertised your post as you have employment rights and I need to meet with you to discuss that also. Ordinarily the process would be, because you have been in post for 20 so long that we would meet with you and another doctor (e.g. Dr MacInnes). At that meeting we would check that you are happy with the job plan etc and would then (assuming you are happy) offer you the job permanently. If there were concerns on your part etc then we would discuss these. I know you wanted to meet in confidence so I 25 wondered if you wanted to meet separately with me before we meet with Brian? I didn't know the nature of your concerns to know how to play it.' The claimant replied 'Many thanks Graham. You are spot on. I need to meet with you privately first.'

30 (ii) During the period over June 2015 the Charge Nurse in Ward 18 was absent on long term sick leave. The Deputy Charge Nurse, who was acting up as Charge Nurse to cover this long term absence was not as experienced as that Charge Nurse. That had implications on the

tensions between the claimant and the consultants in that ward at that time.

(jj) Following the April email correspondence, in July 2015 the claimant met with Dr Ellis. No minutes of that meeting were taken. The meeting lasted around two and a half hours. The claimant's position to Dr Ellis was that that was a confidential meeting. The claimant's concerns were in respect of the duties he was being expected to a carry out in his role for the respondent and were made in the context of there being no agreed job plan in place. The claimant discussed the work that he had done within his chosen speciality of stroke, his expectation that he would be working in the stroke unit and his wishes to work with his chosen area of speciality. Dr Ellis proposed that there should be a meeting between himself, the claimant and Dr McGurn to discuss the claimant's job plan. At this July meeting the claimant did discuss with Dr Ellis certain practices in Ward 18, in particular with regard to forms for AWI ('Adults With Incapacity') and DNACPR ('Do Not Attempt Cardio Pulmonary Resuscitation) and Anticipatory Care Plans. The claimant was concerned at time scale within which these forms were expected to be completed on transfer of the patients to Ward 18. As at July 201 , there was a relatively new process in place in respect of completion of AW I forms. Consent is a fundamental part of medical practice. The assessment in respect of AWI can be challenging because the patient may change day to day and a patient may have 'temporary confusion'. The process in Ward 18 was to assess when it was relevant to complete an AWI form. If a patient arrives on a ward without capacity, then there is a responsibility for the AWI form to be completed. Capacity is determined by the clinician in discussion with the patient, their family (if any), the Multi-Disciplinary Team involved (Occupational Therapists, Physiotherapists, etc). Dr Ellis expected the claimant to be able to determine a patient's capacity in this way and if in doubt to ask advice.

(kk) There can be a difference of opinion between clinical practitioners on the completion of anticipatory care plans. The claimant's position to Dr Ellis in July 2015 was that some patients were on an Interim Care Plan for too long. Dr Ellis is of the view that Interim Care Plans can overlap with Intermediate Care Plans and that patients in Ward 18 should be given time before decisions are made as to their future care e.g. moving to a nursing home and that sometimes intermediate care can determine whether that patient's condition improves, deteriorates or stays the same. Dr Ellis' opinion is that decision which could have long term implications should not be rushed without giving the patient time to get better. It is good practice for the anticipatory care plan to be done as soon as possible but there may be reasons such the patient's long and complex history which will impact on this. The anticipatory care plan can have an effect on the treatment which is given to the patient. Anticipatory Care Plans are a relatively new development, considered to be good practice and developed in recognition of futile treatments and seeking to limit these. It was the claimant's position to Dr Ellis that a patient had waited too long in hospital without a consultant making decisions and had been 'overtreated'. Following that July meeting, Dr Ellis carried out a 'safety walk round' of Ward 18 with the Nurse Consultant. He did this as a result of the claimant's position to him that a patient had been 'overtreated'. That is a distinct matter from a patient coming to harm. It was not the claimant's position to Dr Ellis that any patient had come to harm or that the health and safety of any individual had or was likely to be endangered. It was not the claimant’s position to Dr Ellis at that meeting that he was raising matters of public interest in respect of the endangerment of any person's health and safety. It was not the claimant’s position at that meeting that he was raising matters which were protected disclosures.

(ll) As at July 2015 the claimant had considerable knowledge about and interest in the general principles behind the legislation protecting

certain disclosures. The claimant had brought a claim to the Employment Tribunal under the legislation governing protected disclosure and had been successful in that claim. The claimant had given evidence as a 'whistleblower' to the 'Freedom to Speak Up Review' conducted by Sir Robert Francis QC ('the Francis Inquiry'). The claimant had been interviewed for features about 'whistleblowing' in newspaper and radio. The respondent has in place a Whistleblowing Policy Whistleblowing: Safely Raising concerns about risk, malpractice or wrongdoing at work'. At no time during the claimant's employment with the respondent did the claimant raise any matter under the respondent's Whistleblowing Policy. At no time did the claimant bring any concerns about practices, behaviour or issues to the attention of the GMC or any other external body. Datix reports are used within hospitals to report concerns and raise awareness of any risk to the organisation. The claimant did not raise any Datix report reporting any issue of concern in respect of any practice within the respondent's organisation. The respondent had a system in place during the course of the claimant's employment that any concerns could be raised by direct email to the HR Director (Kenny Small).The claimant did not raise any public interest concerns about patients with Kenny Small or with the Chief Executive, with whom he was in direct mail contact.

(mm) The needs of the service continued to be that the respondent required the claimant to work in the Continuing Care Ward rather than the stroke ward. The claimant continued be unhappy about that position. Following his meeting with Dr Ellis in July 2015 the claimant continued to be concerned about the duties he was being asked to undertake in his role with the respondent. This included concern about completion of anticipatory care plans for patients in Ward 18. This is reflected in the claimant's email to Dr Ellis on 7 July 2015 (Doc 713) (after the meeting took place) The claimant's position in that email was 'If they did not have that plan, it is probably

inappropriate for a 'locum speciality doctor' to make that plan/ decision while Consultants have weekly ward rounds." In Dr Ellis' reply (Doc 713) he indicates that he expected the claimant to take on this responsibility. Dr Ellis stated:-

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> "I don't suppose I can advise you on every job issue but I would probably suggest that this could be an opportunity to take on more responsibility since I recall that you had looked after 120 long term care patients and as you said felt that some of the issues should be resolved to avoid inappropriate escalation of therapy? Remember too that you had applied for associate specialist status and have >20 years nhs experience - all of which says you are not simply a locum staff grade!"

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Dr Ellis' email to the claimant ended "Remind me when I get back and we can meet up with Brian McGum. Meanwhile be mindful about whether you want to sign on the dotted line before we meet."

(nn) Following his meeting with Dr Ellis in July 2015 the claimant was offered a permanent position and accepted that. The written contract reflecting this permanent status was sent to the claimant on 24th November 2015 (Doc 774). The claimant had a choice whether he wished to accept that contract or not. The claimant continued to not be in agreement about the content of the job plan in respect of that post. The covering letter at Doc 774, from Ruth Broadfoot (HR-Medical Staffing) refers to this as follows:-

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> "I understand that there are ongoing discussions with Dr B McGurn, Deputy Clinical Director and Dr G Ellis, Associate Medical Director in relation to your weekly job plan, however I thought it would be better to forward the contract to you separately whilst these discussions are ongoing."

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(oo) On 22 September 2015 the claimant emailed Mr Campbell (Doc 724 - 725). This email begins:-

> "I honestly did not want to share this aspect with you to avoid any perceived conflict of interest of what I was trying to achieve in the wider context during my personal spare time. However, I am really anxious lately and thought it prudent to give you a heads up on my personal situation."

In this email, the claimant that states his concerns at resigning from a permanent post to join the respondent on what he understood would become a permanent contract but having the insecurity of being continued to be employed since October 2012 on a series of 3 month contracts. In that email the claimant also states:-

> "The reasons for my acute anxiety this time are: the recent HR conference, but more importantly, senior nurses have observed the manner (a) couple of very junior consultants had been speaking to me or treating me in clinical areas over a long period of time and only recently reported the matter to their superiors to escalate. Given my situation with a 3 monthly contract and being at the mercy of a system which I am fully aware of, and also because of the much wider and higher issues I had in my hands and mind, I kept my head down to keep the family roof and provide food on the table."

(pp) On receipt of this email, Mr Campbell asked Kenny Small (HR Director) to look into the matter and brief him and asked to meet with the claimant and Mr Small (emails at Docs 724 - 726). Mr Small looked into the matter. He considered that it was inappropriate that the claimant had been employed under a series of fixed term contracts for so long and instructed that the claimant be issued with a permanent contract, without any interview before that issue. The

claimant had just been issued a further 3 month extension, on 24th. September 201 5. Ruth Broadfoot then wrote to the claimant on 7th October 2015 in the following terms:-

> "As you are aware, since starting employment with NHS Lanarkshire on 11th October 2012 you have been appointed on a succession of fixed term contracts.
>
> Following a review of your position I would like to clarify your contractual position with NHS Lanarkshire and I can confirm that your position will now be made permanent. Your contract of employment will shortly follow this letter. I would also like to reiterate that this letter supersedes the letter dates 24th September 201 5 which was sent to your home address.
>
> I do understand however that you are currently in discussion with local management level about your Job Plan which forms part of your Contract of Employment. If you remain dissatisfied with these discussions I would be grateful if you would contact me at the above number to confirm whether you want to invoke the process of mediation as per schedule 5 of the national terms and conditions of service (attached) which I have previously outlined to you in a previous email.
>
> In the meantime Dr Das if there is anything further please do not hesitate to contact me."

(qq) The claimant was going through difficult family circumstances at this time. His father died in September 2015, while in India and the claimant travelled to India for the funeral. Around this time, the claimant's sister's husband, who lived with his wife and 14 year old daughter in Canada, was diagnosed with terminal cancer. The claimant had two weeks compassionate leave, after which he

returned to work. He was later certified as unfit for work for 4 weeks due to 'stress at home' (Doc 750).

(rr) The claimant Mr Small emailed the claimant on 12 October 2015 (Doc 748) to check that the claimant had received his permanent contract. The claimant had not had access to emails as he had been absent from work and out of the country due to the death of his father. The claimant met with Mr Campbell (Chief Executive) and Mr Small (HR Director) on 29 October 2016. Mr Campbell took notes of that meeting, which are at Doc 751. At that meeting, there was discussion about the claimant's concern at having been employed on a series of fixed term contracts, that the claimant had been offered a permanent contract prior to the meeting and that there was an outstanding issue with regard to the Job Plan. It was also the claimant's position at that meeting that nursing staff had complained about his treatment at the hands of fellow staff (being consultants in Ward 18). The claimant referred to 'junior consultants'. Mr Small told the claimant that he didn't recognise that term. At no time during that meeting or at any other time did the claimant make Mr Campbell or Mr Small aware that it was his position that he had made protected disclosures to Dr Ellis in July 2015. The note at Doc 75 records:-

> "SD confirmed that he has no other ongoing concerns. He thanked KS and CC and agreed to let us know if there are any new problems.".

(ss) The claimant followed up this meeting with an email to Mr Campbell and Mr Small on at 29 October 2015 (Doc 752). The claimant thanked them for their time listening to him, informed them of the difficult circumstances in respect of his brother in law's diagnosis. He concluded :-

> "I felt very much reassured when you commented that I have not been treated differently - because I stand for 'fairness for ALL' (employees) who work honestly and with sincerity...."

5 (tt) The claimant was then certified as unfit for work. Following his return to work, the claimant submitted an application for leave from 29 December 2015 until 31 December 2015. These 3 days were the three working days in between Christmas and New Year. Because of public holidays and weekends, by submitting this request for 3 10 days this would mean that the claimant would be off for 11 days over the Christmas and New Year period. The claimant requested this leave because he thought he may be required to travel to Canada to visit his sister and assist her in coping with her husband deteriorating health. Dr MacInnes knew that the claimant's brother in law was 15 unwell and that his sister in Canada was struggling with the difficult circumstances. He did not know that the claimant planned to visit Canada. The claimant did not discuss cover for his role during this period with other doctors in the department or with Dr MacInnes prior to submitting this paperwork. Clinicians' leave requests within the 20 respondent's organisation are normally agreed between colleagues and discussed with the line manager prior to a request being submitted in writing. Prior to the claimant making this leave application, the respondent had received notification from the medical unit that there was to be no leave over the Christmas and 25 New Year festive period.

(uu) Dr MacInnes took the decision to put the claimant's leave on hold. He did not refuse the claimant's application for leave over this period. His letter to the claimant in respect of this matter is dated 20 30 November 2015 and is at Doc 756. This states:-

> "Thank you for your request for this leave. At present I am being asked to ensure that we have enough staff to ensure

> that we are able to run the clinical services in which it is expected to be a busy period after Christmas. Your request at the moment has not been accepted but put on hold. It should be noted that in the Department of Medicine there is an agreed policy of no leave over this period although this is not yet applicable in the Care of the Elderly Unit."

(vv) The claimant was 'alarmed* at what he saw as the 'very formal manner in which the request was refused'. The claimant was 'dismayed' because previously if there was an issue with the claimant's application for leave, Dr MacInnes had either phoned the claimant or 'stuck a post-it note' on the application and because the claimant felt that Dr MacInnes 'knew about' the claimant's 'difficult situation' in respect of his brother in law in Canada. The claimant believed that Dr McGurn had asked Dr MacInnes to write the letter at Doc 756 because the claimant had raised issues with senior management. The claimant did not believe that the argument that robust cover was required was relevant to his role in Ward 18. The claimant believed that if he was absent on leave then there would be no TIA Clinic scheduled. The claimant believed that this was 'retaliation for having gone over my senior's heads to the CEO'. That was not the reason for Dr MacInnes' response to the claimant's leave request. Dr MacInnes took the decision to put the claimant's application for leave on hold because the claimant had not discussed cover over the festive period with his colleagues or with Dr MacInnes prior to putting in this application, because another doctor had asked for leave over the festive period, because Dr MacInnes required to ensure that there was appropriate cover over this festive period, which included cover for Ward 18 and cover for TIA Clinics, which had to be run to ensure that the 4 day target for seeing patients was met and because at the time of the claimant's request the medical unit had notified that there should be no annual leave taken over the festive period. The claimant had already made the leave request

formal by submitting a written application. There was no sinister or retaliatory reason for Dr MacInnes replying to the claimant the way he did in respect of this leave application.

5 (ww) The claimant responded to Dr MacInnes in writing by letter dated 23 November 2015 (Doc 772 - 773), which he copied to Dr Keaney, Dr McGurn, Dr Ellis, Mr Calum Campbell (Chief Executive), Ms M Fraser (Senior Medical Staffing) and Mr K Small (HR Director). The claimant was in direct email correspondence with Mr Campbell and

10 with Marlene Fraser (docs 758 - 762). In his email to Mr Campbell of 23 November 2015 the claimant stated:-

> "I am happy to look for a job elsewhere but these are the colleagues who are then supposed to provide reference."

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As a result of the claimant raising the issue of his annual leave request with Mr Campbell, an email was sent by Mr Campbell's PA on his behalf (Doc 764), suggesting that a further meeting take place between the claimant, Mr Campbell and Mr Small. This meeting took

20 place in January 2016. The claimant was in further direct email correspondence with Mr Campbell on 4 December 2015 (Doc 782) and 22 - 23 December 2015 (Doc 806 - 807). In that correspondence the claimant referred to his forthcoming presentation on protected disclosure issues at an Audit Scotland event. The

25 claimant stated "Thank you always for your moral support" and "I want your blessings on behalf of the organisation - a progressive one I believe, under your stewardship." The claimant was again in direct email correspondence with Mr Campbell on 13 - 14 January 2016 (doc 810-811) and on 23 January Doc 812).

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(xx) Dr Ellis replied to being copied in on the correspondence re the annual leave request by his email to the claimant of 23 November 2015 (doc 768 - 769). This stated:-

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> "Firstly allow me to express my sympathy at the loss of your father. I am sure it has been a very difficult time for you and your family. I am glad to see that you are back at work and in that connection I will see if my pa can get a meeting organised with yourself and Brian McGurn to pick up on our previous discussions about your job plan.

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> On the subject of annual leave you will understand that the festive period is a difficult time to balance the demands of service which reach fever pitch dur to public holidays and the needs of families - especially those with children. I am sure that you can understand the need to plan around that. I am certain that leave requests can be best resolved by local discussion and I suggest your pick that up with Brian.

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> Meantime hopefully Brian and I can pick up with you in the next week on other matters."

(yy) The claimant had a return to work interview with Dr McGurn on 26 November 2015. At that meeting, Dr McGurn was made aware by the claimant that he continued to be in dispute about the content of his Job Plan. The claimant's position was that he wished to progress to mediation in respect of that matter. Dr McGurn's position to the claimant was that he hoped that that a meeting between the claimant, Dr McGurn and Dr Ellis to discuss the Job Plan content could 'de-escalate' the matter. Following that meeting, Dr McGurn referred the claimant to occupational health, contacted Ruth Broadfoot (HR - Staffing) and arranged a further meeting between the claimant, Dr McGurn and Dr Ellis to discuss the Job Plan content.

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(zz) On 4th December 2015 the claimant met Marlene Fraser (Head of Medical Staffing) Her 'aide memoir' (Doc 792 - 793) reflects the matters discussed. The claimant was concerned at what he perceived as bullying treatment of him by Dr MacInnes. The claimant emailed Ms Fraser on 4th December thanking her for her time (doc 794).

(aaa) Dr MacInnes had a discussion with the other doctor who had already requested leave for that period and agreed with her that she would instead take leave in the week before Christmas. Following that agreement, on 4th December 2015, Dr MacInnes informed the claimant that he approved the claimant's request for annual leave (Doc 790) . The claimant later informed Dr MacInnes in email of 21 December 2015 (Doc 802) that he did not require to take that leave. This email makes no mention of the circumstances of the claimant's brother in law's ill health.

(bbb) Also on 4th December 2015, the claimant met with Dr McGurn and Dr Ellis. The claimant emailed Dr Ellis in relation to this meeting on 5th December 2015 (doc 796 - 797). His position was that he had not understood this to be a meeting about the job plan but that he "still saw it as an opportunity to bring up issues around my role, irrespective whether my colleagues wanted those shared with you or not." The claimant continued to be in dispute over the content of the Job Plan, in particular his lack of work within the stroke unit.

(ccc) On 22 January 2016 the claimant met with Mr Campbell and Mr Small to discuss the issue re the claimant's annual leave request (the correspondence at Docs 756 & 772-773). Mr Small asked the claimant if he had copied the Chief Executive into the correspondence to feel 'safe'. The claimant's position was that he had and that he now felt safe because his position had been made

permanent. The claimant's position was that he was concerned at the formal nature of Dr MacInnes' reply to his request for annual leave being a letter on NHS letterhead notepaper. The claimant made allegations of bullying and harassment which he wished to be investigated. The claimant was asked to put detail of his complaint in writing, which he did so to Niall Cockburn (HR Manager) on 30 January 2016. The claimant did not discuss with Mr Campbell that he believed he had made any protected disclosure in respect of any practices within the Respondent's organisation. The claimant was in direct email contact with Mr Campbell, including about his general interest in and presentations made by him on issues of protected disclosures and 'whistleblowing' . At no time did the claimant raise with Mr Campbell that he believed he had made protected disclosures to Dr Ellis or anyone else in respect of any practices or behaviour within the respondent's organisation. Mr Campbell wrote to the claimant on 25th January 2016 (doc 813). He stated :-

> "On the basis of the nature of the concerns expressed, I consider that the investigation and response should be managed under the terms of the NHS Lanarkshire Policy and Procedure on Preventing and Dealing with Bullying, Harassment and Victimisation."

The claimant's detailed written complaint is at Doc 312-316 (also at Doc 818 - 822) and is headed by the claimant 'Formal Stage of complaint under NHS Lanarkshire's policy on Preventing and Dealing with Bullying, Harassment and Victimisation'. That complaint was dealt with under the respondent's Policy on Preventing and Dealing with Bullying, Harassment and Victimisation (Doc 110 - 135).

(ddd) On 3rd February 2016 the claimant met with Dr McGurn for the purposes of job planning. Dr McGurn understood that the claimant was concerned that because of his duties in ward 18 he did not have

time to develop his specialism in stroke. Email correspondence between Dr McGurn and the claimant followed (Docs 838 - 842). Dr McGurn had thought that agreement on the content of the Job Plan could be reached with the claimant. He sent him a draft weekly plan, and the claimant agreed with this 'in principle' (doc 838). The claimant then emailed Dr McGurn (Doc 841) stating:-

> "Sorry Brian. I did not note that the contentious issue of ward 18 discharge dictations had been added once again to the job plan, which was not discussed yesterday. I do not agree with the above and am happy to discuss further with you, or request mediation."

Dr McGurn replied to this as follows (Doc 841):-

> "I am sorry that you feel that dictations are contentious. To be clear, I am not expecting you to do all of the ward 18 discharge dictations. It is, though, an essential activity that is part of all senior doctors job plan and the reason for not raising it is that I assumed that you were perhaps already contributing to this. I know, I should not have assumed.

I am happy to meet with you further or if you request discuss with HR how we commence the mediation process."

The claimant replied (Doc 841):-

> "Brian, I don't think I do the job of 'senior medical staff[1] in ward 18. I am happy to invoke mediation on the matter. Thanks anyway."

(eee) In March 2016 a meeting for the purposes of job plan mediation took place between the claimant, Dr McGurn and Dr Ellis. There was

discussion on what it was reasonable for the claimant to be expected to do. The claimant's position continued to be that his duties in Ward 18 meant that he could not focus on speciality stoke. The needs of service continued to be that the respondent required the claimant to work in the continuing care ward and not in the stroke unit. The claimant's position continued to be that the content of the job plan which the respondent required to be carried out was significantly different from the role described in the job advert for which the claimant had applied. There was discussion on the appropriateness of the claimant drafting discharge letters for Ward 18 patients. No agreement was reached. The meeting came to an end when the claimant disclosed that he had raised a grievance against Dr McGurn. Neither Dr McGurn or Dr Ellis had been aware of that at the commencement of the meeting. The main areas of discussion at this meeting are reflected in Dr Ellis' letter to the claimant of 24th March 2016 (doc 990 - 992). This sets out Dr Ellis' conclusion on the mediation, which was that the job plan proposed for the claimant was fair. As the next (and final) stage in the mediation process, the claimant submitted an appeal to the Chief Executive in respect of Dr Ellis' outcome letter (Doc 998 - 999). That appeal process was later suspended pending the outcome of the claimant's bullying and harassment complaint. The claimant took no further action in respect of that appeal process.

(fff) The claimant continued to be of the view that it was not appropriate for him to be drafting discharge letters (including death certificates) for patients in ward 18. The email correspondence between the claimant and Dr Duffty in April 2016 (Doc 688) shows that this continued to be an issue. Dr Duffty expected the claimant to do these discharges but the claimant did not agree.

(ggg) Dr Helen Mackie (Head of Medical staffing and then Chief of Medical Services - Hairmyres) dealt with the claimant's grievance made

under the bullying and harassment policy. She was assisted by Mr Niall Cockburn (Human Resources Manager - HR Medical and Dental Services). The claimant's grievance was progressed as being a complaint made against four consultants and one senior doctor (being Dr McGurn, Dr MacInnes, Dr Duffty, Dr Peacock and Dr Lan) and about a culture of bullying in the department. This is reflected in the sections of the investigation report which followed (as referred to at Doc 249). Dr Mackie and Mr Cockburn's investigations took place in the period from February to June 2016. The report following their investigation is comprehensive and is at Doc 247 - 282. There was also an appendix to this report, including statements taken and other relevant documents as listed at Doc 248. They interviewed the claimant first and then interviewed seven others. Each of those individuals was asked if they had anything to add and gave their view on the claimant. A view was expressed that the claimant may have 'manipulated situations for his own benefit*. Those allegations arose within the course of the investigation. The claimant was not given the opportunity to comment on those allegations before the outcome of the report. Those allegations were material to the outcome of the report.

(hhh) Dr Helen Mackie took the decision in respect of the outcome of the claimant’s Bullying and Harassment Complaint. Dr Mackie did not know of any protected disclosures made by the claimant to Dr Ellis in July 2015. At no time prior to the outcome of his bullying and harassment complaint did the claimant inform Dr Mackie that he considered he had made protected disclosures to Dr Ellis in July 2015.

(iii) On 16 June 2016 the claimant was issued the outcome of his complaint made under the bullying and harassment policy. The outcome letter to the claimant is at Doc 245 - 246 (and at 1054 - 1055). A paper copy of the report which is at Doc 247 - 271 was

given to him at a meeting with Dr Mackie and Mr Cockburn. Mr Cockburn's note of this meeting is at Doc 243 - 244 (also at 1056 - 1057) and accurately reflects the meeting. At this meeting the outcome at section H of this report was read out to the claimant.
5 Section H9 states:-

"The panel believe that Dr Das has failed to follow the ethos of this policy adequately. Where Dr Das has advised that he reported straight to the Chief Executive, the informal stages of
10 the policy (section 4.6) have not been followed which may have resolved a number of the issues as and when they happened rather than almost four years later. This would potentially have avoided any formal complaint and any unnecessary distress to staff including Dr Das.

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The informal stages of the policy are-

- Discuss the incident with the alleged bully and explain the impact their negative behaviour has had, asking them to stop.

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- Keep accurate, objective records of the incidents

- If they cannot approach the alleged bully, use email or a written note or ask someone to approach the bully for them.

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- Facilitated meetings can be arranged with all parties involved

- Mediation can be used as an outcome an supportive process.

30 Under the formal stages of the policy (section 4.7.4) the panel are able to consider whether the complaint raised has been malicious and misleading. This has been carefully considered by the panel and

it is believed that Dr Das has potentially been malicious and misleading in raising the multiple complaints against staff many of which have stemmed from his own behaviours and he blames others.

5 This decision has been based on:-

- The lack of evidence of potential bullying, harassment or victimisation from other witnesses.

JO

- Accounts from several staff of Dr Das himself exhibiting obstructive behaviours.

- Accounts from several staff of examples of interpersonal tensions.

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Dr Duffty has acknowledged interpersonal tensions in her working relationship with Dr Das, however the panel believe the examples given in no way amount to bullying, harassment or victimisation on her behalf. Staff have been very distressed by the overly critical complaints and comments that have been made by Dr Das. Dr Duffty gave examples of Dr Das behaviours which she felt were undermining. Nursing staff and Dr Peacock also reported that they felt Dr Das manipulated situations for his own benefit.

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25 It is difficult to judge the cause of Dr Das' behaviour whether linked to negativity over his previous employment or whether he has an issue with specific consultants. There are however some mitigating circumstances:-

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- Insecurity of Dr Das over the permanence of his post.

- The lack of clarity about the role and the development of this

- The perception among speciality doctors of unequal allocations of workload

- Delays in resolving office space issues

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In considering all the evidence available to the panel, it is their view that even when allowing for the mitigating circumstances, the claims made of bullying, harassment and victimisation against staff is an inappropriate use of this policy and demonstrates a lack of insight from Dr Das regarding the affect his behaviour has on others.

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Under the Preventing and Dealing with Bulling Harassment Policy it is noted that 77 *the complaint is considered to be malicious and misleading, the complainant's line manger should arrange a disciplinary hearing for their member of staff.** The investigation panel are unable to confirm if the complaint has been raised in bad faith, although it could be deemed as being malicious and misleading.

15

It is recommended that at the very least Formal Counselling is put in place under the Employee Conduct Policy and Procedures. *'Formal Counselling is not disciplinary action under the terms of this policy; it is a positive means whereby managers can advise, guide and correct members of staff with the aim of improving, supporting and maintaining acceptable standards of conduct. This may be the result of an investigatory meeting and will be confirmed in writing, detailing any action to be undertaken and signed by both parties. The counselling should be undertaken in a formal meeting and should involve an HR Advisor. '*

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Formal counselling will allow for the recommendations made to take place with an aim to build relationships within the department. It will also allow for reflection by Dr Das in the areas recommended and provide a period of time to address concerns.

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In summary the following recommendations have been made specific to Dr Das:-

- Performance Review and Development

  - A review of speciality doctor job plans, workload and types of tasks to ensure parity in terms of workload, responsibilities and development opportunities.

  - Support to Dr Das in the completion of anticipatory care plans etc.

  - A review of Dr Das's ability to work within a team to ensure that effective development of his skills are in place and the skills are used to develop the stoke unit as required.

- Formal Counselling

  - Closure in relation to his past issues in previous employment and reassurance over his role in NHS Lanarkshire.

  - The distress caused to individuals over the complaint being raised and his interpersonal skills in discussions with staff.

  - The misuse of NHS Lanarkshire policy and procedure and the need for informal and local resolution

- Mentoring and Mediation to assist in the development of both interpersonal and interaction skills including how Dr Das reacts to receiving feedback and being challenged over his views, prescribing and care.

The actions should be put in place and reviewed after 6 months with a determination on the need to extend this if it is deemed to be appropriate.

5 Under the Preventing and Dealing with Bullying, Harassment and Victimisation Policy, Dr Das will have the opportunity to ask for a review of the evidence where he remains dissatisfied with the outcome. On receipt of this report Dr Das will have three weeks to raise a request for review. "

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(kkk) After hearing these conclusions, the claimant stated 'This looks to me like constructive dismissal." Dr Mackie's reply was that that was not the case and that the report and recommendations were viewed as being a supportive measure based on the evidence available and
15 that she wanted the department to work together cohesively and be supportive. Her position was that as part of this, Dr Das should take on board the recommendations made to help rebuild the department, building trust and also to develop his own interpersonal skills. Mr Cockburn encouraged the claimant to take on board what was being
20 said and to review all the evidence before making a decision.

(lll) No disciplinary action was recommended to be taken or was instigated against the claimant by respondent. There were Conclusions and recommendations in that Section H of the
25 investigation outcome report which were supportive of the claimant and his position. These were :-

At section' H1 Initial Job Advert and Job Pack' :-

30 "It is recommended that the above practice continues and at local level it is reviewed exactly what is required for the role, where it is anticipated there is a need for flexibility and

changes in service development this should be discussed and documented for agreement with all parties.'

At section 'H2 Review of Speciality Doctor Posts' :-

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"It is recommended that a review of job plans, workload and the type of tasks being carried out by speciality doctors within care of the elderly be undertaken to ensure parity in terms of workload, responsibilities and development opportunities.'

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At section 'H3 Management Development':-

"Some processes may have been too informal e.g. job planning, performance management and annual leave management, where communication between parties could have been clearer. Dr Das's uncertainty over his permanent role may have added to his uncertainty."

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At section 'H4 Workload regarding AWI/CarePlans and DNACPR paperwork:-

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"It is recommended Dr Das be given support to clarify and develop the process within the department and ensure required forms are completed as necessary."

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At section 'H5 Issues in Previous Boards':-

"The panel believe that Dr Das needs some form of closure to move on from the past. He needs reassurance on his role within NHS Lanarkshire and how he can develop the stroke unit, which appears well within his capabilities but is not progressing despite encouragement. Staff at Hairmyres Hospital appear to be supportive and he needs to build the

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trust and accept support staff can give to him without maintaining a continual barrier."

At section H8 Mentor and Mediation :-

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"Dr Das may benefit from having a workplace mentor who may be able to assist him in his interpersonal and interaction skills, including how he reacts to receiving feedback and being challenged over his views, prescribing and care.

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It is also recommended that some form of mediation or facilitated meeting takes place with Dr Das and staff to resolve all remaining issues."

15 (mmm) The claimant was unhappy that his complaint had not been upheld. The claimant was very upset at this outcome and concerned at what he considered to be criticisms of him in the report. At the meeting, after he had been read the summary of the findings, the claimant said ‘This looks like constructive dismissal.’. The claimant was given 20 three weeks to raise a review if he wished to do so. The claimant was encouraged to contact BMA, MDDUS or to take separate legal advice if he wished to do so. The claimant was visibly upset at the meeting. He was reminded of support being available from occupational health, counselling and spiritual support, should he 25 consider that needed. The claimant was certified as unfit for work because of 'stress at work' from 22nd June 2016. He was referred to occupational health. He attended a sickness absence meeting with Dr Keaney on 25 July 2016. Also in attendance were Janette Latham (HR Advisor) and Martyn Ramsay (BMA Representative). 30 The discussions at that meeting are summarised in Dr Keaney's letter to the claimant of 27 July 2016 (doc 1088 - 1090). There were discussions on steps to support the claimant's return to work.

(nnn) On 27 July 2016 the claimant submitted a request for a review of the outcome of his complaint made under the bullying and harassment policy. That review application is in the form of 11 pages of close typescript (Doc 1076 - 1086). Dr Jane Burns (Divisional Medical Director (Acute), was appointed to conduct the review, supported by John White (Divisional HR Director (Acute). Dr Burns spent 'several hours' reviewing the papers prior to making a decision in respect of the claimant's review application. She did not meet with or offer to meet with the claimant. One of the issues raised in by the claimant in his review application was that allegations had been made against him during the course of the investigation into his bullying and harassment complaint and that he had not had the opportunity to respond to those allegations. Those allegations were material to the outcome of the claimant's complaint.

(ooo) The claimant began looking for alternative employment shortly after the meeting when he was advised of the outcome of his complaint made under the bullying and harassment policy. The claimant applied for a position at the Beatson Clinic. He later withdrew his application because he wished to work within his chosen field of stroke medicine and the claimant became aware of a vacancy working within this speciality field with Tayside Health Board. The claimant applied for this stroke speciality position with Tayside Health Board on 30th June 2016. The claimant attended a job interview for that position on 17th August 2016. Prior to the claimant receiving the outcome of his review of the outcome of the bullying and harassment complaint, the claimant accepted a conditional offer for the stroke speciality position with Tayside Health Board. That offer was made subject to certain clearances, being their receipt of a satisfactory reference for the claimant from the respondent and clearance from occupational health in respect of the claimant's fitness to work. The claimant accepted that conditional offer on 20th August 2016. The claimant was concerned that the conditions may not be satisfied.

The claimant did not know if the respondent would provide a satisfactory reference for him. At the time of the claimant's acceptance of the offer from Tayside Health Board he remained unfit for work in respect of his role with the respondent.

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(ppp) Dr Jane Burn’s letter which was the outcome of the review process is at Doc 1110. It is dated 22nd August 2016. The claimant received this outcome after he had accepted the conditional offer from Tayside Health Board. That review outcome did not impact on the claimant's decision to accept that offer of employment from Tayside Health Board. Dr Burn's review outcome letter is an inadequate response to the claimant’s letter requesting a review. This response does not address the concerns raised by the claimant in respect of allegations made against him in the course of the investigation. The outcome gives no indication that all or part of Dr Burns' reason for not interviewing the claimant was that she believed that that would then require the whole investigation to be re-done. The outcome letter stated :-

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> "I refer to your request for a review of the investigatory outcome concerning the complaint you made regarding several colleagues within Care of the Elderly at Hairmyres Hospital. The complaint was investigated in line with NHS Lanarkshire’s Bullying, Harassment and Victimisation Policy.

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> I was supported in this review by John White, Divisional HR Director. The review comprised a full and careful examination of the case portfolio including your allegations, interview statements and supplementary documents.

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> I am satisfied that due process was followed and your concerns have been investigated in line with NHS Lanarkshire policy. I was assured that the level of scrutiny applied to the

investigation was such that an accurate account f all matters would prevail. In light of the level of detail available for me I did not consider it necessary to re-interview yourself or any other party.

As a result of my review I have concluded that there is no evidence to support your claim of bullying, harassment and victimisation from any of the individuals concerned. I also confirm that my review did not evidence an underlying culture of bullying, harassment or victimisation within the department.

I note the recommendations proposed for you and the department and hope these will be enacted to ensure satisfactory closure of this matter. Whilst this may not have been the outcome you expected I hope you will accept this to be a full and fair review.'

(qqq) The claimant continued to be employed by the respondent until his resignation on 7th November 2016. The claimant was certified as unfit for work for the respondent due to 'stress at work' from 22 June 2016 until his resignation. He received his contractual entitlement to sick pay. He attended sickness absence monitoring meetings. The claimant attended an Occupation Health appointment on 4 August 2016. There was correspondence between the claimant, Dr Keaney (Clinical Director - Medicine & Associated Specialities) and Janette Latham (HR Advisor) in respect of his sickness absence and return to work (at Docs 1116-1118 (letter from Dr Keaney to Dr Das 30 August 2016); 1130 - 1131 (letter from Dr Keaney to Dr Das 19 September 2016); 1135 (letter from Dr Das to Dr Keaney 4 October 2016); 1136-1137 (emails between Janette Latham and Dr Das 4 & 5 October 2016); 1138 (letter from Dr Keaney to Dr Das 28 October 2016). There is no indication in this correspondence of the claimant having accepted the conditional offer of employment from Tayside

Health Board. The letter from Dr Keaney at Doc113 includes notification to the claimant that his contractual entitlement to full sick pay would cease on 22nd November 2016.

5 (rrr) The claimant's letter of resignation was submitted to the respondent on 7th November 2016. That letter of resignation is at Document 1140 - 1141. There is no reference to Dr Bums' review outcome letter in that letter of resignation. The claimant's position in his letter of resignation was that the respondent had acted in breach of 10 contract. The claimant relied on not being given the 'chance to respond' to 'criticism'. This was in respect of the allegations of 'manipulation' made against him within the course of the investigation of his bullying and harassment complaint. The claimant relied on the grievance outcome as a breach of contract entitling him to resign 15 without notice. The final paragraph of his letter of resignation states:-

> "The actions of NHS Lanarkshire are a clear breach of the implied duty of mutual trust and confidence and I regard myself as having been constructively dismissed. I also regard 20 my treatment since the raising of the complaint as detriment and subsequent constructive dismissal as a result of me having made protected disclosure in the form of my grievance. In the circumstances I am freed from the obligation of providing NHS Lanarkshire with notice of termination of 25 employment and therefore my resignation is effective immediately."

(sss) The claimant did not rely in his letter of resignation on having made protected disclosures to Dr Ellis in July 2015. The claimant gave no 30 indication in his letter of resignation that he had secured or would shortly be commencing employment with Tayside Health Board. The claimant commenced his employment with Tayside Health Board on 8th November 2016, the day after he sent his letter of resignation.

That is a permanent role, working as a Speciality doctor within the Acute Stroke Unit. The fact of the claimant having secured this employment was a significant factor in the claimant's decision to resign on 7th November 2016.

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(ttt) Prior to sending his resignation letter on 7th November 2016, the claimant took no action to indicate to the respondent his continued dissatisfaction on receipt of Dr Bums' letter giving the outcome of his review application. The claimant knew that could have raised a Grievance in respect of that outcome. He chose not to do so. Because the claimant did not indicate his continuing dissatisfaction, had the claimant not secured alternative employment and had he become fit to return to work for the respondent, the outcomes set out by Dr Mackie would have been put in place, including a mentor and counselling for the claimant, re his Job Plan appeal. The claimant took no action re taking discussions on his job plan to the final appeal stage.

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(uuu) The claimant's earnings in respect of his employment are exactly in line with his earnings with the Respondent. The claimant has suffered no wage loss as a result of leaving his employment with the respondent. The claimant continues to maintain his family in Ayrshire and cannot commute daily from there to his work with NHS Tayside because of the distance involved. The claimant's wife has a career in Ayrshire and does not want to move. The claimant commutes to Tayside from Ayrshire on a weekly rather than a daily basis. When the claimant commuted to his work with the respondent he shared a car with his wife and travelled via her workplace. The claimant rents a shared flat (Tenancy Agreement at Doc 1146 - 1148) within the Ninewells Hospital site. The rent of £583 per month includes accommodation, council tax, gas and electricity costs. This tenancy entitles the claimant to buy a parking permit at £25 per month (£300 annually) for car parking within the hospital site, which

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he does so (receipts at 1151 - 1152). The claimant would otherwise incur additional parking costs if he rented outwith the hospital site and travelled to work by car. The claimant is responsible for provision of his own TV and internet facilities at this rented flat and incurs, costs in respect of this (Doc 1153 re TV licence). Prior to the claimant completing his law degree as a part time student at Strathclyde University the claimant incurred costs travelling from Dundee to attend 2 evening classes a week there. The claimant graduated with an LLB in June 2017.

(vvv) The claimant experiences no interpersonal issues in his role at Tayside Health Board. He has received letters of support from professional colleagues there (Docs 1196 & 1197) stating "In summary, Dr Das is an invaluable member of the Stroke Team here at Ninewells Hospital where he is functioning at a senior level and I have no concerns about his clinical ability or professionalism" and describing him as a 'trustworthy, professional, truthful and very likeable individual". The claimant is happy in his role there and takes professional satisfaction from working within his chosen area of speciality of stroke medicine, with an Acute Stroke Unit. The claimant recognises that there are few opportunities to work in Scotland as a Speciality Doctor within acute stroke and his intention is for his position at Ninewells Hospital to be long term, until his retirement.

Representatives* Submissions

14. Both representatives spoke to their comprehensive written submissions. Having regard to Rule 62(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, rather than seeking to summarise those submissions, both submissions are attached as Appendices to this Judgment. The claimant’s representative’s written submissions are at Appendix A and the respondent’s representative’s

written submissions are at Appendix B. The parties' representatives took a different approach in their submissions. The claimant's representative was given the opportunity to address points made by the respondent's representative in his submissions.

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Relevant Law

Protected Disclosures

10 15. The Employment Rights Act 1996 ('ERA') contains provisions in relation to protected disclosures. Section 43B(1)(d) provides that any disclosure which in the reasonable belief of the worker is made in the public interest and tends to show that the health and safety of any individual has been, is being or is likely to be endangered is a qualifying disclosure.

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16. Section 103A provides that the dismissal of an employee is automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure. Section 124(1 A) provides that in cases of automatically unfair dismissal, 20 where the dismissal was by reason of the employee having made a protected disclosure in contravention of section 103A, the statutory maximum compensatory award limit does not apply.

Constructive Dismissal

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17. Section 95(1)(c) of the ERA sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed 30 by his employer (constructive dismissal) .There is much case law which has developed in respect of constructive dismissal and which is relevant to the tribunal's determination of a claim under section 95(1)(c).

Case Law Referred to

18. Parties representatives helpfully liaised to produce an agreed list of Authorities relevant to the Tribunals' determination. This is set out at Appendix C. During the course of submissions, The Tribunal drew parties' representatives' attention to *Croft V Consignia pic* 2002 IRLR 851 EAT with regard to matters which may not be sufficient to be a material breach of contract and *Software 2000 Ltd* -v- *Andrews and others* 2007 ICR 825, EAT, with regard to the Tribunal entering into speculation as to what might have occurred, in the event of a successful unfair dismissal claim when applying the requirements of section 123(1) ERA in awarding what is just and equitable having regard to the loss sustained by the claimant. The authorities referred to by the representatives were as follows, with page references indicating pages in the joint bundle of authorities helpfully produced for the Tribunal's reference.:-

Constructive dismissal		
1.	Western Excavating v Sharp [1978] ICR 221	1 - 10
2.	Cox Toner (International) Ltd v Crook [1981] IRLR 443	11 - 16
3.	Woods v WM Car Services (Peterborough) [1981] ICR 666	17-26
4.	Malik vBCCI [1997] ICR 77	27-50
5.	Glendale Managed Services v Graham [2003] IRLR 465	51-54
6.	Wedgewood v Hortimax [2003] UKEAT/0997/01	55-62
7.	Omilaju v Waltham Forest LBC [2005] ICR 481	63-74
8.	Keen v Commerzbank AG [2007] ICR 623	75-92
9.	Bournemouth University v Buckland [2010] ICR 908	93-106
10.	Watson v University of Strathclyde [2011] IRLR 458	107-112
11.	Wright v North Ayrshire Council [2014] ICR 77	113-120
12.	Brodie, D; The Contract of Employment; para 8.17	121 -122
Mitigation of loss		

13.	Cooper Contracting v Lindsey UKEAT/0184/15	123-142
Whistleblowing		
14.	Kuzel v Roche [2008] ICR 799	143-156
15.	Bolton School v Evans [2007] ICR 641	157-170
16.	SCA Packaging Ltd v Boyle [2009] ICR 1056	171 -194
17.	Phoenix House Ltd v Stockman [2017] ICR 84	195-206
18.	Asghar & Co Solicitors v Habib UKEAT/0332/16/DM	207 - 228
19.	Chesterton Global Ltd v Nurmohamed [2017] IRLR 837	229 - 236
20.	Eiger Securities LLP v Korshunova [2017] IRLR 115	237 - 246

Compensation

19. Where the Tribunal makes a finding of unfair dismissal it can order reinstatement or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Effect of Failure to Comply with the ACAS Code

20. With regard to dismissals after 6 April 2009, section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA') provides that if the ACAS Code of Practice entitled 'Disciplinary and Grievance Procedures' ('the Code') applies and it appears to the Tribunal that :-

    (jjj) the claim to which the proceedings relate concerns a matter to which the Code applies,

    (kkk) the employer has failed to comply with the Code in relation to that matter, and

    (III) the failure was unreasonable,

    The Tribunal may, if it considers it just and equitable in ail the circumstances to do so, increase any award it makes to the employee by no more than 25%. There is a similar provision for a reduction if the employee has failed to comply with the Code and that failure was unreasonable.

Comments on evidence

21. Witness statements were exchanged between representatives on 22nd January. Much of the content of the witness statements was not contested in cross-examination.

22. The claimant appeared to the Tribunal to be a man of principle and justifiably proud of his career in his chosen professional field. It did however seem to the Tribunal that the claimant had a tendency to see things from his own perspective, without appreciating wider considerations. This was particularly apparent to the Tribunal in respect of the issue re the claimant's request for leave over the festive period in 2015. It was also apparent in the claimant's disagreement under cross examination that there were

conclusions in the grievance outcome investigation report which were supportive of him. With regard to the public interest disclosure claim, under cross examination, the claimant accepted that the respondent had a Whistleblowing Policy in place since December 2012. The claimant's evidence was that the intention of that policy was 'if I raise concerns then I should not be victimised for concerns raised to protect the public.' The claimant accepted that he could have accessed that policy from HR if he had wanted to utilise it. The claimant accepted the stated aims, purpose and outcomes of that Policy (at Doc 153). In these circumstances, and given the claimant's high awareness of whistleblowing issues, given his involvement in the Francis Inquiry, the Tribunal attached considerable weight to the fact that the claimant had not raised any issue with the Respondent in terms of their Whistleblowing Policy. The Tribunal did not accept the claimant's explanation for this as being that he felt vulnerable because he was employed under a series of fixed term contracts. The claimant knew that there is legislative protection for 'whistleblowing' and that does not explain why the claimant did not utilise the Whistleblowing Policy after he had been issued a permanent contact of employment by the respondent. The Tribunal also considered it to be significant that the claimant did not raise any concern with the GMC and that there was no evidence (and it was not his position) that he had made any Datix report in respect of any patient safety issue) The claimant's evidence was "I was feeling vulnerable from past experiences. I had been kept out of Stroke. I had to tread carefully. I raised with the appropriate person." The Tribunal concluded that the claimant did not utilise the Whistleblowing Policy because his issues of concern were not of public interest, but rather rated to the duties required of him in his role and clinical differences of opinion in respect of care plans.

23. Dr MacInnes was open and candid in his evidence, accepting a number of matters which were put to him in cross examination. He was found to be entirely credible and reliable. Dr McGurn and Dr Ellis were very careful in their evidence, often making reference to being unable to recall 'the

specifics' of a conversation. Callum Campbell and Kenny Small and were open and candid in their evidence. The Tribunal found Mr Campbell to be entirely credible and reliable. The Tribunal found Mr Small to be credible but not entirely reliable only because in his written witness statement he appeared to be confused over what had been discussed at the first and second meeting with the claimant and Mr Campbell (particularly with regard to discussion on the annual leave request, which was made in November 2015 and therefore could not have been discussed at the meeting in October 2015). Mr Small did explain in his witness statement that both meetings were 'very similar and covered similar ground' and that given explanation was accepted as the reason for his confusion.

24. Dr Mackie was found to be open and candid in her evidence. She gave her explanations for reaching the conclusions she came to in respect of the outcome of the claimant's Bullying and harassment complaint. There was no suggestion that the investigation of that complaint was less than thorough. There was no suggestion that the findings were not supported by the investigations, just that there were matters which arose in those investigations which were material and which the claimant ought to have been given the opportunity to comment on. Dr Mackie's evidence and the terms of the written outcome of the claimant's grievance outcome were important because the Tribunal accepted Mr Hardman's submissions that it was important to consider this outcome in terms of whether the respondent was seeking to protect the employment relationship. Although the Tribunal criticises the respondent for failing to give the claimant the opportunity to comment on allegations against him which had arisen in the course of the investigation into his bullying and harassment complaint, the Tribunal accepted that in the outcome of that bullying and harassment complaint the respondent was seeking to protect their employment relationship with the claimant In reaching this conclusion, the Tribunal considered the following to be significant:-

- a number of the findings in the Outcome report were supportive of the claimant's position, as set out in the Findings in Fact

- no disciplinary proceedings were instigated against the claimant following from the findings in the outcome report

- conciliatory measures were recommended to be put in place, including support for the claimant and mediation.

The Tribunal concluded that these factors were indicative of the respondent seeking to protect the employment relationship. The claimant should have been given the opportunity to respond to the allegations made against him which had arisen in the course of the investigation before findings were made on the basis of these allegations, but the Tribunal concluded that in all the material facts the failure to so do was not a material breach of contract. The Respondent dealt with the claimant's bulling and harassment complaint within the terms of their policy. The claimant did not like the outcome but there was no material breach of contract by that outcome. The Tribunal concluded from the findings of the claimant's bullying and harassment complaint and from Dr Mackie's evidence before the Tribunal that in that outcome the respondent was seeking to protect was seeking to protect the employment relationship between the claimant and the respondent and was seeking to deal with the interpersonal issues and repair the damage.

25. It was noted by the Tribunal that the allegation that the claimant had possibly been manipulative had come from a nurse and that the Tribunal did not hear any evidence from any nursing staff. That allegation was somewhat contradictory to the evidence of the respondent's witnesses that the claimant had a good relationship with the nursing staff. The implication was that one nurse, who had been acting up in a management role while a more experienced nurse was absent on sick leave, felt that the claimant had in some way taken advantage of that good relationship by inducing her to speak to Dr Duffty in support of the claimant. There was no evidence and it

was not suggested before the Tribunal that the claimant had asked that nurse to speak to Dr Duffty on his behalf or in support of his position. The Tribunal accepted that evidence of Dr Mackie that Nurse Murphy was experienced and 'wise' and that her absence was a factor in the
5 interpersonal tensions between the claimant and the consultants in Ward 18.

26. In her dealings with the claimant's bullying and harassment complaint, Dr Mackie had sought to deal with the issues in the department. Those
10 colleagues of the claimant who had been accused of bullying had the right to state their position in respect of the allegations made against them. The investigation sought to obtain the views of individuals who were not themselves accused of bullying by the claimant but who it was considered could contribute to the investigation. There was no criticism by the claimant
15 as to who had been interviewed. Ironically it was individuals who themselves were not accused of bulling by the claimant who raised the question of him being possibly manipulative and of possible performance issues (Dr Ellis) . There was no evidence before the Tribunal to justify the comments made by Dr Ellis to Dr Mackie in the course of this investigation
20 that 'I was concerned that he was raising issues as his performance may not have been to standard' (Doc 345). The Tribunal accepted the claimant's representative's position that the position in Dr Ellis' interview with Dr Mackie and Niall Cockburn (Doc 344 - 346) in respect of what he discussed with Dr Mackie is not entirely reflected in the notes of this meeting with Dr
25 Mackie or the recorded length of that meeting (that timing being undisputed). The Tribunal did however accept Dr Ellis' evidence before the Tribunal in respect of AWI forms and anticipatory care plans and in respect of the content of his discussion with the claimant in June 2015.

30 27. The Tribunal was not impressed by Dr Burn's evidence and considered her review outcome letter to be wholly inadequate. Dr Burns' position in evidence was that she had considered what impression would be given to Dr Das by the length of her review outcome letter in comparison to Dr Das'

letter. Her position was that she considered that carefully but felt that she was confined by the remit of the Review process as set out in the Bullying and Harassment Policy and that there were other avenues available to Dr Das. There is no indication of those reasons set out in her review outcome letter. Similarly, Dr Burn's position in evidence as to the reasons why she did not give Dr Das the opportunity to comment on the allegations against him which had arisen in the course of the investigations of his bullying and harassment complaint were not set out in that response letter. Her position before the Tribunal was that she did not interview Dr Das because of consideration of principles of equity and fairness to all and that if she had interviewed Dr Das then she would have had to interview all others and effectively re-run the investigation, which was not the function of the review process. There is no indication of her consideration of that in her outcome letter. The outcome letter does not direct the claimant to an appeal process or any other avenues. The Tribunal concluded that Dr Burns' review outcome letter was wholly inadequate because it was very short in comparison to the claimant's lengthy review application, it did not seek to address the points made by the claimant in his review application, it did not give any explanation for the outcome and it did not set out that there was an appeal process open to the claimant in respect of the outcome of his bullying and harassment complaint. The Tribunal accepted that Dr Burns considered the papers for 'several hours' before responding to the claimant with her outcome of the review but that time spent did not detract from the inadequacy of the review outcome letter. In these circumstances, it was not surprising to the Tribunal that the claimant considered Dr Burns' response to be an indication that the respondent was seeking closure on his concerns. The claimant may have helped his position by being more succinct in his review application and by highlighting his issue about not being given the opportunity to comment on the allegations made against him of 'manipulation' but that does not detract from the inadequacy of Dr Burns' outcome letter. The Tribunal accepted that findings had been made that the claimant had been manipulative without him having had the opportunity to comment on the allegations which had arisen, that the

claimant was justifiably concerned about that and that those concerns were not addressed in Dr Burns' outcome letter.

28. The Tribunal considered it to be material that Mr Small's position in evidence was that he would expect matters which had arisen during the course of an investigation of an individual's bulling and harassment complaint only if those allegations were material to the outcome. It was clear to the Tribunal that the allegations which had arisen against the claimant were material to the outcome of his grievance and harassment complaint. That appeared to the Tribunal to be significant both in respect of the inadequacy of Dr Burns' response and in respect of the possible eventual outcome, had the claimant appealed that grievance outcome. In light of that evidence, it appeared likely that if the claimant had appealed the outcome on that point, then that appeal would have been successful.

29. Although the Tribunal found that Dr Ellis was not entirely reliable in respect of the matter stated above, the Tribunal did not accept that the claimant had made protected disclosures at that meeting because the Tribunal did not accept that the claimant had raised any issues in the public interest of any patient's health and safety being endangered. It was noted that at the stage of the claimant's representative's submissions it was suggested that in his meeting with Dr Ellis in July 2015 the claimant made protected disclosures in respect of legal obligations. It was accepted that reliance on legal obligations was not part of the claimant's case prior to these submissions being made and that the evidence did not support that legal construct. The Tribunal considered it to be material in reaching this conclusion that the claimant was in direct email communication with the Chief Executive about his interest in public interest disclosure issues in general and that yet there was no evidence and it was not the claimant's position that he had made the Chief Executive aware that he considered he had made public interest disclosures during the course of his employment with the respondent. The Tribunal drew an inference from this and from the claimant's failure to raise any issue under the Whistleblowing Policy, to raise any concern using Datix

reports or to raise any issue with the GMC that the claimant's concerns were not in the public interest but rather were with regard to his own role within the respondent and the duties expected of him in that role.

5 30. It was clear to the Tribunal that there was a dialogue between the claimant and the respondent's Chief Executive, Callum Campbell about the general issue of 'whistle blowing' and that the claimant considered that Callum Campbell was interested in ensuring that whistle blowing matters were dealt with. Under cross examination, the claimant accepted as correct the
10 following entries in the respondent's chronology:-

> "24 March 2015 - Dr Das began to correspond with the Chief Executive, Mr C Campbell. He made it clear he was not writing about an employment* issue, but wanted to meet Mr Campbell to
> 15 discuss how he could contribute positively to the organisation in terms of patient safety.
>
> 23 April, 23 June, 6 August and 15 September 2015 - Dr Das emailed Mr Campbell, broadly, on his past and his public
> 20 presentations on whistleblowing."

In these circumstances, the Tribunal concluded that if the claimant had truly been concerned with patient safety issues and had made protected disclosures to Dr Ellis in his meeting with him in July 2015, then the
25 claimant would have told Callum Campbell that. In particular, the Tribunal concluded that in these circumstances, if the claimant had made what he considered to be protected disclosures, the claimant would have told Mr Campbell that when he met with the Chief Executive and HR Director in October 2015. The evidence did not support the claimant's position that he
30 had made protected disclosures to Dr Ellis in July 2015. The emails which led to that meeting very much give the context of the meeting the discussions about the content of the job plan and the claimant's concern that there may have been discussion about that content with others

(reflected in his email to Dr Duffty re him not dictating discharges). Although, given the claimant's position as a Speciality doctor these issues related to health, the Tribunal was not satisfied that protected disclosures were made in terms of the legislation. The Tribunal also considered it to be material that the claimant had not raised any concerns under the Whistleblowing Policy; no Datix report had been raised by him to highlight a concern about care of a patient; the claimant had not reported any matter to the GMC; MORE . It was noted that the claimant's position to the Fraser Inquiry had been that it was important for individuals not to conflate their concerns about their own employment situation with whistle blowing. It seemed to the Tribunal that that was what had been done by the claimant before this Tribunal. The Tribunal accepted Mr Hardman's submissions that in the circumstances, it might reasonably be expected that had the claimant genuinely wished to make a protected disclosure in the public interest, he would have done so in a more appropriate and focused way than he claims to have done during a confidential conversation with Dr Ellis to discuss concerns about his own role. In all these facts and circumstances the Tribunal concluded that in his discussions with Dr Ellis in July 2015 the claimant had not made disclosures in the public interest. The Tribunal accepted Mr Hardman's submissions on this and that even were the claimant to have raised patient safety concerns with Dr Ellis, these were in the context of discussion of his own role and not in the reasonable belief of the clamant that the disclosure was made in the public interest. The claimant was concerned about his duties as opposed to what the consultants in Ward 18 were doing.

31. Although the claimant's representative initial position had been also to rely on protected disclosures said to have been made in respect of the claimant's claim against Ayrshire and Arran health board it was accepted at the stage of submissions that the evidence did not support that position.

Discussion and decision

32. The first issue for the Tribunal to determine was 'Did Dr Das resign because of conduct by the respondent?' It was clear to the Tribunal that the role being carried out by the claimant for the Respondent, being significantly different from the role for which he had applied, and with a limited opportunity for the claimant to practice in his chosen speciality area of stoke, was a material factor in the claimant's decision to resign. The needs of the service were that the role was not what was initially advertised. The claimant had continued to accept temporary contracts and he eventually accepted a permanent contract but that was always on his understanding that his job plan still had to be agreed and that he was not in agreement with all of the duties which the service required him to be carried out. The Tribunal had no doubt that the claimant would not have stayed until retirement in his role with the respondent as it was not fulfilling his desire to work in his chosen speciality within geriatric medicine of stroke.

33. The Tribunal considered the following factors to be material to the first issue for determi nation :-

    (i) The claimant's duties in his position with the respondent were significantly different from those of the role which had been advertised, particularly because he was not working in the stroke unit

    (ii) The claimant had accepted a series of 3 monthly fixed term contracts and then a permanent contract in respect of his position as speciality doctor with the respondent

    (iii) The claimant remained in disagreement with the respondent about his job plan and the duties which the respondent expected him to carry out in his role as Speciality doctor.

(iv) the outcome of the claimant's bullying and harassment complaint had referenced matters which had arisen during the course of the investigation, after the claimant had been interviewed, which the claimant was not given the opportunity to comment on and which
5 were material to the outcome.

(v) There were interpersonal issues between the claimant and the consultants in Ward 18

10 (vi) The claimant had made a bullying and harassment complaint, progressed as being against four consultants and one other doctor and re a culture of bullying in the department.

(vii) The claimant was aggrieved that his bullying and harassment
15 complaint had not been upheld.

(viii) The claimant considered that his professional conduct had been critised as an outcome of his bullying and harassment complaint and was aggrieved at this.

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(ix) The claimant had not had the opportunity to comment on allegations against him which had arisen in the course of the investigation of his bullying and harassment complaint.

25 (x) The claimant had stated to the respondent on hearing the outcome of his bullying and harassment complaint that he considered that this was 'constructive dismissal'.

(xi) The claimant was certified as unfit for work with the respondent from
30 22nd June 2016.

(xii) The claimant began looking for alternative employment shortly after learning the outcome of his bullying and harassment complaint.

(xiii) The claimant initially applied for a vacancy outwith his specialism and then withdrew this and applied for a vacancy within his stroke specialism.

5 (xiv) The claimant accepted the conditional offer from Tayside Health Board before he received the outcome of his review application in respect of the bullying and harassment outcome.

(xv) Dr Burns' response to the claimant's request for a review was a short 10 and inadequate response and gave no indication to the claimant of any further internal procedure which could be followed by him in respect of his complaints.

(xvi) The claimant attended sickness management absence meetings and 15 continued to be in receipt of sick pay from the respondent until his date of resignation.

(xvii) The claimant began work with his new employer the day after he resigned.

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34. The Tribunal accepted Mr Hardman's submissions for the respondent that the chronology of events is significant to the determination of the reason for the claimant's dismissal. The Tribunal considered it to be particularly significant, and attached weight to the fact that:-

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- The claimant began looking for another job shortly after receiving outcome of the bullying and harassment complaint

- The claimant applied for but withdrew applications for jobs which 30 were not working within his chosen field of stroke medicine

- The claimant wished to work within his chosen speciality of stroke medicine.

- A vacancy arose within Tayside Health Board for a speciality doctor working in stroke medicine.

- The claimant was successful at interview for this Tayside Health Board speciality doctor post and accepted the conditional offer from Tayside prior to the outcome of the review.

- The claimant began work for Tayside Health Board the day after his resignation.

35. The outcome of the review was not a material factor on the claimant's decision to resign because the claimant had accepted the conditional offer from Tayside before he received the review outcome letter. The resignation letter was only sent once satisfactory refence had been received (from Dr Mactnnes) and the claimant had clearance from Occupational Health. There was no evidence of any other condition to the acceptance. The letter of resignation contains no mention of the review outcome letter. The Tribunal had no doubt that the trigger for the resignation letter being sent was that the claimant's offer of employment from Tayside Health Board had become unconditional on receipt of the satisfactory refence and health clearance. By resigning and declaring in his letter of resignation that the respondent had acted in breach of contract, the claimant declared himself as no longer bound by his contractual notice period with the respondent and he began work with Tayside the day after his resignation. The Tribunal considered that to be particularly significant and attached considerable weight to the fact of the claimant resigning the day before he began work for his new employer. The Tribunal accepted M Hardman's submissions that there was no evidence or suggestion of any sinister motivation to the claimant having been employed in a series of fixed term contracts for a lengthy period and that that was not a factor in the claimant's decision to

resign, it explicitly being stated by the claimant that he was 'prepared to draw a line under' that. The Tribunal also accepted his submission that there was no evidence that the failure to provide or agree a job plan for the clamant had any sinister motivation.

36. The reason for a person's resignation can be multifactorial. The claimant is a professional man who had legitimate concerns about his income stream and ability to meet his financial obligations for him and his family. These were undoubtedly relevant factors in the timing of his resignation. In all the circumstances, the Tribunal considered it appropriate to look at whether there had been a repudiatory breach of contract as at the date of the claimant's acceptance of the conditional offer from Tayside. Although the claimant's representative's primary submission was that the outcome of the bullying and harassment complaint, together with the review outcome letter was a fundamental breach of the implied contractual term of trust and confidence, entitling the claimant to resign, the Tribunal concluded that that was not reflective of the facts as they occurred because as at the date of the claimant's acceptance of the conditional offer from Tayside Health Board, he had not received the outcome of the review. On the facts, the review outcome letter was not a material factor in the claimant's decision to resign. The claimant had already accepted the conditional offer of employment from Tayside and the only material factors to that offer being unconditional were that the claimant receive a satisfactory reference and occupational health clearance.

37. In considering first issue for its determination, the Tribunal was careful to adopt the approach set down by the EAT in *Wright -v North Ayrshire Council* (EAT(Sc) 2014 ICR 7, and not to look for <u>the</u> effective cause of the resignation. It was clear to the Tribunal that the unconditional offer from Tayside Health Board was <u>an</u> effective cause for the claimant's resignation. The Tribunal is careful to use the indefinite article here, rather than the definite article of 'the effective cause', in recognition of Langstaff J comments at paragraph 14 in *Wright -v North Ayrshire Council.*

38. The present case was complicated by the fact of the offer of employment from Tayside Heath Board being conditional, and the claimant accepting that conditional offer but not been resigning until the offer had been made
5 unconditional.

39. The Tribunal considered the question of 'Did Dr Das resign because of conduct by the respondent?' in terms of *Wright -v- North Ayrshire Council* and the position set out in the rubrick of that case that :-

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> “it was an error of law the employment tribunal to look for the effective cause of the claimant’s resignation in the sense of the predominant principal major or main cause. The crucial question in establishing whether an employee who had more than one reason for
> 15 resigning had been constructively dismissed was whether repudiation or breach of contract had played a part in the resignation and that as the tribunal had misdirected itself and its decision was not in any event plainly and arguably right the matter would be remitted to the tribunal to determine whether the employer's repudiatory breaches
> 20 had played a part in the claimant’s resignation.

40. In all the material facts and circumstances, the Tribunal’s conclusion as to the answer to the first issue for its determination of did Dr Das resign because of conduct by the respondent was ‘partly’. It seemed to the
25 Tribunal that this question was more in line with the identification of the effective cause of resignation. The Tribunal found that in the present case, as in *Wright,* there were multifactorial reasons for the claimant’s resignation. The trigger for the claimant resigning when he did was certainly the unconditional offer of employment from Tayside Health Board. Part of the
30 reason for the claimant applying for the job with Tayside Health Board was conduct by the respondent. An important part of the reason for the claimant applying for that job, and resigning from his employment with the respondent, was also because the job at Tayside Health Board was an

opportunity for the claimant to work in his specialist area of stroke. The position in Tayside was not ideal for the claimant because of its location in respect of the location of the claimant's family home and his wife's place of work, although it did (and does) provide the opportunity for professional satisfaction for him. The Tribunal was satisfied that part of the reason for the claimant's resignation was the conduct of the respondent, although that was not the whole reason for the resignation. The Tribunal attached considerable weight to the fact that the claimant started working for Tayside the day after his resignation. The claimant was not prepared to resign without first securing alternative employment in his chosen field of stroke medicine. The Tribunal concluded from the claimant's decision to withdraw his application to work in the Beatson that the type of alternative employment the claimant was able to secure was important to him. It was important to the claimant that he work in a field which was of interest to him. The Tribunal understands the professional reasons for that, but that must impact on the reasons for the claimant's resignation. It was not just that prior to his resignation the claimant sought to secure alternative employment so as to meet his family financial responsibilities: the claimant sought alternative employment only in his chosen specialist field of stroke medicine. The unconditional offer of a position in this specialist field caused the claimant to submit his resignation to the respondent.

41. The Tribunal noted that per Langstaff J at paragraph 20 in *Wright:-*

> *"Where there is more than one reason why an employee leaves a Job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."*

42. The Tribunal's consideration of *Wright* led it back to carefully consider the principles in *Western Excavating (ECC) Ltd -v- Sharp* [1978] ICR 221; [1978] QB 761 and whether (per paragraph 2 in Wright):-

'there has been a breach of contract by the employer that the breach is fundamental or is as it has been put more recently a breach which indicate that the employer altogether abandonments and refuses to perform its side of the contract that the employee has resigned in response to the breach and that before doing so she has not acted so as to affirm the contract notwithstanding the breach. '

43. The Tribunal accepted Mr Hay's submission that in this fact sensitive case the correct approach was to apply the test in *Malik v BCCI* [1997] ICR 606 per Lord Steyn at paragraph 56, where the obligation is expressed as being "the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee" In its consideration on this, the Tribunal considered it important to consider the chronology of events. The Tribunal accepted Mr Hardman's submissions that the chronology of events was important in this consideration. In these facts and circumstances, the Tribunal considered that it was important to identify the conduct by the respondent which contributed to the claimant's decision to accept the conditional offer from Tayside Health Board. That conduct was the outcome of the claimant's bullying and harassment complaint and the fact that the duties which the respondent required the claimant to carry out in his role were substantially different from those set out in the job advert for which the claimant had applied. That conduct was not calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It was not conduct which was in fundamental breach of the contract of employment.

44. At the time of the claimant's acceptance of the conditional offer from Tayside the respondent had not acted in material breach of contract. The claimant did not like or agree with the outcome of the bullying and harassment complaint but the respondent had followed their own procedures in terms of dealing with that complaint. In all the circumstances the failure to seek the claimant's position on the allegations which had

arisen during the course of the investigation did not either in itself or in conjunction with the history as set out in the findings in fact, constitute a material breach of contract entitling the claimant to resign. The Tribunal accepted Mr Hardman's submissions in this regard. Looking at the outcome of the claimant's bullying and harassment complaint objectively, the recommendations set out in Section H are those of a reasonable employer seeking to resolve a workplace issue and maintain the working relationships and, crucially, seeking to maintain their employment relationship with the claimant. The respondent did not act in breach of contract. The claimant was not satisfied with the outcome but the respondent acted within their procedures.

45. The Tribunal also accepted Mr Hardman's submissions in respect of affirmation. If there had been any breach of contract by the respondent, then by his actions in maintaining the employment relationship until his resignation, the claimant had affirmed any such breach. There are some similarities between the present case and those in *Wright* but the cases are not entirely on all fours. The circumstances in the present case were not that the outcome of the grievance showed 'a complete lack of consideration', as had been found by the Employment Tribunal in *Wright.* In the present case, the first two requirements for a claim for constructive dismissal had not been satisfied: there had been no material breach of contract and if there had been then the claimant by his actions had affirmed the contract. The Tribunal concluded that even if there had been a material breach of contract by the respondent's outcome to the claimant's bullying and harassment complaint and their response to the claimant's review application (either taken together or in conjunction with the history of events relied upon by the claimant), the claimant by his actions had affirmed any breach of contract by the respondent. There was no 'clear expression of discontent' as referred to by Mr Hay in his submissions. The claimant did not submit any grievance or appeal in respect of the outcome of the review. Once the claimant returned to work, it was expected that the outcomes of the claimant's bullying and harassment complaint in terms of appointment of

a mentor, counselling etc would be put into place. The claimant did not indicate to the respondent that he did not accept the outcome of that review. The claimant continued to accept sick pay and attend sickness absence meetings without submitting an appeal in respect of the bullying and harassment outcome or submitting a grievance in respect of that outcome. No action was initiated in respect of the recommendations for counselling, mentorship set out in the outcome of the bullying and harassment complaint because the claimant had been absent from work due to ill health. There was nothing to suggest that these measures would not be put in place had the claimant not obtained alternative employment, and not resigned, and had he recovered sufficiently to return to work. It may be that a lengthy sickness absence would have triggered certain absence management procedure. There was no evidence to suggest that the respondent would have taken any steps on the claimant's return to work other than those set out in the outcome of the claimant's bullying and harassment complaint. By the time of the claimant's resignation, the time period for appeal of that outcome in terms of the respondent's policies and procedures had elapsed. In these facts and circumstances, the Tribunal concluded that the claimant had acted in affirmation of the contract.

46. The Tribunal therefore concluded that there was no conduct by the respondent which was calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The claimant's claim for constructive dismissal does not succeed.

47. For the reasons set out in the 'Comments on the Evidence' section, the Tribunal did not accept that the claimant had raised certain protected disclosures, with regard to the statutory definition of 'protected disclosure' found in section 43B ERA. On the evidence, and applying an objective test (following *Phoenix House Limited v Stockman* [2017] ICR 84) the Tribunal did not find that information imparted by the claimant to Dr Ellis in their meeting in July 2015 tended to show the likelihood of breaches of legal

obligations, or of endangerment to health and safety. Following Mr Hay's submissions, the Tribunal did not take likely' to mean 'probably'. Having found that there had been no protected disclosure made by the claimant, the Tribunal did not then accept that any such protected disclosure was the reason, or principle reason, for the claimant's resignation (or constructive dismissal, if that had been established). The Tribunal was not satisfied o the evidence and for the reasons set out above that the reason or principal reason for the claimant's resignation was that the claimant had made a protected disclosure (or that the claimant had made a protected disclosure). The claimant's claim under section 103A does not succeed.

48. As the claimant's claims under both section 98 and section 103 of the Employment Rights Act were unsuccessful, it did not fall on the Tribunal to consider what financial loss Dr Das suffered arising from his resignation. Had the Tribunal required to go on to consider that question, it would have followed the guidance in *Software 2000 Ltd* -v- *Andrews and others,* to make an assessment of what was likely to have happened, using its common sense, experience and a sense of justice. The Tribunal would have made such award as they considered to be just and equitable in terms of section 123 of the ERA. The Tribunal would have accepted Mr Hardman's submissions in respect of the period of loss and the relevant travel costs to be taken into account.

Employment Judge: **C McManus**
Date of Judgment: **06 March 2018**
Entered in register: **07 March 2018**
and copied to parties