Case Nos: 1806282/2020 and 1803046/2021

LEEDS EMPLOYMENT TRIBUNALS

Claimant: **Mr C Y Eng**

Respondent: **Sheffield Teaching Hospitals NHS Foundation Trust**

REASONS

Requested by the parties following promulgation of Judgment

Background

1. The Claimant commenced his employment with the Respondent in the position of Consultant Otolaryngologist in the Respondent's ENT Directorate on 16 January 2020. He was granted leave by the Respondent to return to Malaysia on 19 February 2020. He did not return to the UK and resume work with the Respondent until 11 January 2021. He resigned from the Respondent's employment with notice on 22 February 2021 and his employment ended after expiry of notice on 13 April 2021.

2. The Claimant claims direct race discrimination asserting that he was treated less favourably by reason of his race (Malaysian / Chinese) contrary to s.13 Equality Act 2010 ("EqA") by the Respondent failing to enter into negotiations or agree to his request to work remotely from Malaysia until his return to the UK; and by the Respondent preparing a roster that provided him with more clinics and less theatre time than two colleagues. The Claimant further claims that he was harassed by reason of his race, contrary to s.26 EqA, by an employee of the Respondent, Ms Tranter, who he alleges, in the period between 24 June and 30 July 2020 pressurized him to take sickness leave .

3. The Claimant claims damages alleging that the Respondent acted in breach of contract by failing to pay him his wages between 1 June 2020 and 10 June 2021. The Claimant also pursues a claim under s.44 Employments Rights Act 1996 ("the Act") in which he alleges that the Respondent subjected him to detriments because he refused to attend his place of work in circumstances of danger which he reasonably believed to be serious and imminent. The detriments are that the Respondent failed to pay him between 1 June 2020 and 10 January 2021; did not award him a Clinical Excellence Award for 2020; and sent him a letter dated 24 November 2020 which required him to commence his duties in the UK or

have his employment terminated.

4. The Claimant further claims that the Respondent made unlawful deductions of wages contrary to s.23 of the Act by failing to pay him wages due for the period between 15 August and 28 August 2020. He also asserts that the Respondent failed to provide him with written particulars of his employment contrary to s.1 of the Act.

5. The Claimant pursues a claim of unfair constructive dismissal. Firstly, he claims that the Respondent breached its implied duty of trust and confidence towards him by not conducting an appropriate risk assessment before his return to work in January 2020; by failing to give him appropriate guidance at that time; and by failing to provide him, and others, with appropriate PPE safety equipment. Secondly, he relies on the allegations of harassment and breach of his contract of employment set out above. Thirdly, he claims that the Respondent failed to pay him his Clinical Excellence Award for 2020 and for twenty hours work carried out by him on 3 and 4 February 2020. The Claimant also asserts that he was constructively dismissed because of his race.

6. His claims of unpaid holiday pay and unlawful deduction of wages by the Respondent in April and May 2020 have been previously struck out by the Tribunal. During the course of this hearing, the Claimant withdrew his separate claim of unlawful deduction of wages in July and August 2020 which was dismissed by the Tribunal upon that withdrawal.

7. The Tribunal were provided with an Agreed Bundle (**Exhibit R1**), which comprised 1,900 pages, to which additional documents were added during the course of this hearing. The Tribunal records that very few of the documents were relevant to matters under consideration by the Tribunal. It also records that all documents which were referred to the Tribunal by the parties during the course of the Tribunal were read by them either before the hearing commenced, during the course of the hearing or during their consideration of the evidence in reaching their judgments.

8. The Tribunal received evidence in chief from the Claimant by way of written statement (**Exhibit C1**); and evidence from four witnesses on behalf of the Respondent who gave their evidence in chief by written statements. These witnesses were: Mrs C Wilkie, Operations Director, Head & Neck Care Group, (**Exhibit R2**), Mrs B Davidson, Assistant Head of Medical HR (**Exhibits R3**); Professor J Ray, Clinical Director ENT and Hearing Services (**Exhibit R4**) and Mr M Yardley, Senior Consultant, ENT Department (**Exhibit R5**). The Tribunal received oral submissions from Mr Boyd, who also submitted a Skeleton Argument (**Exhibit R6**), and from the Claimant, who submitted a Supporting Statement (**Exhibit C2**).

9. The Claimant did not challenge the evidence which the Respondent's witnesses provided to the Tribunal in respect of his recruitment, his employment history and the circumstances of his return to work within the UK in January 2021. The Respondent's witnesses also gave clear and unchallenged explanations of the reasons for the actions taken by the Respondent to deal with the unusual circumstances that arose after the

Claimant returned to Malaysia shortly after commencing his employment with the Respondent and the actions which he took after his return to Malaysia. The Tribunal has made the following undisputed findings of fact from the oral and documentary evidence provided to them.

Findings of Fact

10. Mrs Wilkie prepared the business case for the Respondent to appoint a further Consultant to the Respondent's ENT Department. This included a job description, person specifications and indicative timetables. These were prepared with Professor Ray, the Clinical Director of the Department, who would be the successful applicant's Line Manager.

11. Mrs Wilkie explained that a Consultant's job plan is divided into Programmed Activities ("PAs"). These are blocks of time, usually equivalent to four hours, in which contractual duties are performed. There are four basic categories of contractual work: Direct Clinical Care ("DCC"), Supporting Professional Activities ("SPAs"), Additional Responsibilities and External Duties. The purpose of a job plan is to set out the different types of work for which a Consultant will be responsible and how many PAs he / she will be working in those different areas of work.

12. The indicative timetables prepared by Mrs Wilkie were included in the advertised job description. The key duties and components of the advertised job, which are set out in the indicative timetable, are then incorporated into the job plan provided to the successful applicant. The job description is not a formal job plan but a general indication of the requirements of the post and the outlines of the work with which the appointed Consultant will be involved supported by the indicative timetables provided by the Respondent to applicants for the job. Job plans are usually agreed with Consultants shortly after they commence their employment with the Respondent. They are reviewed each year as part of the Respondent's annual job planning procedure and to take account of how the Consultant develops his / her skills and expertise within the department and his / her ongoing workload.

13. The Claimant accepted Mrs Wilkie's evidence that job plans will be, and are different for each Consultant. This is because each Consultant's job plan is dependent on their overall commitments, their expertise, their patient caseload and how they work with other colleagues in sub-specialist teams. The job plan for a new Consultant will be dependent on the Respondent's service needs at the time he / she is appointed. The job description together with the indicative timetable which had been prepared for the job were made available to the Claimant and to all other applicants who applied for the job. When this job description and its indicative timetable were prepared as part of Mrs Wilkie's business case for the appointment of a new Consultant in the ENT Department she and her fellow managers did not know who would apply for the position, who would be appointed or the ethnicity of the successful applicant.

14. The Claimant conceded that he accepted the job on the basis of the job description and indicative timetable that had been shared with him. There was a considerable delay between the Claimant accepting the job in

April 2019 and commencing his employment on 16 January 2020. This only exacerbated the impact of the shortage of required resources in the ENT Team. It was the Respondent's understanding that one reason for the delay in the Claimant's arrival was that he had to take steps to close his private practice in Malaysia before travelling to the UK.

15. On 3 February 2020, less than three weeks after commencing his employment with the Respondent, the Claimant requested an extended period of leave from Professor Ray. The Respondent requires any requests for leave to be submitted at least six weeks in advance of the commencement of the leave requested. On 3 February 2020 the Claimant requested a six week leave period from 19 February to enable him to return to Malaysia. Professor Ray referred this unusual request to Mrs Wilkie. It caused them some concern but they decided that, notwithstanding the demands on the ENT Department they would make an exception for the Claimant. However, they could only grant him a three week leave period and could only provide that period of leave to him by utilising a one week study leave period to add to two weeks annual leave. This was a substantial, and supportive, concession to be made after such a short period of service.

16. After the Claimant had been informed that his leave request had been granted for a three week period he informed Professor Ray that he had not, as yet, closed his private practice in Malaysia. By this time he had also informed Professor Ray that he was not satisfied with the his job plan previously shared with him. He also informed Professor Ray that he would not be prepared to close his private practice in Malaysia until the Respondent had made the changes to the job plan which he had requested and he was satisfied with it. This was a negotiating position which caused Professor Ray and Mrs Wilkie considerable concern because it indicated that the Claimant was not committed to the job he had only recently commenced with the Respondent.

17. At the end of February 2020 the Covid-19 outbreak resulted in the UK Government determining that those travelling back to the UK from Malaysia would need to self-isolate for fourteen days after arrival in the UK. This required the Claimant's patient activities to be cancelled for fourteen days after 9 March 2020 when he was due to return. This would have allowed him to self-isolate at home on his return from Malaysia. Therefore, the Respondent made arrangements to incorporate this fourteen day isolation period into working arrangements for the ENT Team, to take account of the fact that the Claimant would not be returning to work until 23 March 2020. The Respondent assigned no work to the Claimant during this period of self-isolation.

18. The Claimant informed the Respondent in an email of 4 March 2020 that he was suffering from a slight intermittent ticklish cough, without fever, and no nasal symptoms. The Respondent advised him that he should follow the Government's guidelines regarding travel. The Respondent made it clear that although there were no restrictions on the Claimant returning to England by 9 March, if he was too ill to travel, he should obtain a medical certificate from a qualified medical practitioner in Malaysia. It was explained to him that this would enable the Respondent to register him as absent

through sickness in accordance with its Managing Attendance Policy. The Claimant duly provided copies of relevant medical certificates. The first was dated 7 March 2020. It signed him off for one month. It stated that he was not fit to travel and was supported by a letter from his physician in Malaysia. It made no reference to Covid-19. At no time was it stated, or suggested, that the Claimant's illness, and his inability to attend work, and travel, was caused by Covid-19.

19. On 10 March 2020 the Claimant sent an email which confirmed that he had seen a respiratory physician who had diagnosed him with an upper respiratory tract infection, which was complicated by bronchitis and bronchospasm. The Claimant confirmed that he had been signed off work for this medical condition and that when he received the all clear from his doctor he would be making arrangements to return to Sheffield. He also confirmed that he had been advised that he did not need to be tested for Covid-19.

20. The Respondent correctly categorized the Claimant's absence as sickness absence. This was because he had been medically assessed as unfit to travel and was unable to attend work to undertake his duties. Subsequently, as requested, the Claimant sent in further medical certificates. These signed him off work until 4 July 2020. It was clear to the Respondent at the time, has not been challenged by the Claimant in these proceedings, and is accepted by the Tribunal, after its consideration of documentation provided to it, that his absence did not fall within a category of medical exclusion, or self-isolation related to exposure to Covid-19.

21. Mrs Davidson explained the Claimant's position after he was signed off as unfit to travel in early March 2020 and how the Respondent applied its relevant sickness absence procedures to deal with his situation. Her evidence was not challenged by the Claimant and is accepted by the Tribunal. The Claimant's entitlement to sick pay when he was signed off work by medical certificates was determined by the Terms and Conditions of his employment. His sick pay entitlement was, due to his previous NHS service, limited to one month on full pay.

22. The Claimant should have received only statutory sick pay from 7 April 2020 onwards. It has been agreed that there was an error made in respect of the Claimant's continuous service entitlement which resulted in him being overpaid until the expiry of his last sick note which signed him off work until 4 July 2020. The Tribunal does not have to involve itself in how this overpayment was dealt with. The Claimant confirmed to the Tribunal that he accepted that he had been overpaid and understands that the Respondent is entitled to repayment of that overpayment from him. He has also conceded that he knew that he was on unpaid leave from 4 July 2020 until he resumed working in Sheffield on 11 January 2021.

23. Notwithstanding this concession the Claimant claims that he was entitled to be paid full pay whilst he remained in Malaysia under the NHS Employers Guidance which advised that full pay could be due for all Covid-19 related sickness absence when an employee could not attend work as a result of Covid-19.

24. The helpful explanation provided by Mrs Davidson of the genesis and terms of the Guidance on which the Claimant relies was not disputed by him. In brief, the genesis was the extent of sickness absences of medical staff caused by Covid-19. The NHS responded by making a policy recommendation that the full pay could continue to be paid to medical staff who were absent as a result of contracting Covid-19. The Guidance was not the product of a national collective agreement. It was not incorporated into individual contracts of employment. The Claimant had no contractual entitlement to payment of full pay within the terms of the Guidance.

25. In any event, the Claimant did not fall within the Guidance. This was because he did not submit at any time that he had tested positive for Covid-19, or inform the Respondent that he had been required to self-isolate because of Covid-19, or had done so. The Claimant became fit to return to the UK when his medical certificate expired on 4 July 2020. The Respondent had established by its diligent enquiries that there were flights available for him to do so from 9 July 2020 onwards (and on the documentation provided to the Respondent at an earlier date than that). The Claimant chose not to do so and understood that he was on unpaid leave until his return to work for the Respondent.

26. The disclosures made in these proceedings also confirmed that the Claimant had continued working in his private practice during his residence in Malaysia from February 2020 to January 2021. He had earned an average of £25,000 per month during his residence in Malaysia. He had suffered no financial loss during this period. Furthermore, on the evidence before the Tribunal he had no contractual entitlement to be paid wages by the Respondent, other than statutory sick pay, up to 4 July 2020, and, as already stated above, he had no contractual entitlement to payment of wages under the Guidance.

27. The Claimant had made a request for an increase in his salary to both Professor Ray and HR at the time he made his request for leave. He had also canvassed Professor Ray about arranging a job share with another colleague from Malaysia which, not surprisingly, caused some concern to Professor Ray and Mrs Wilkie. The Claimant also expressed dissatisfaction with his job plan at this time notwithstanding that this had been shared, and discussed, before he commenced work at the Hospital. He wanted Professor Ray to cancel an afternoon clinic scheduled for him on Wednesdays to enable him to have a day a week to take up private work. After he returned to Malaysia, he then expressed dissatisfaction with the theatre time which had been allocated to him in the job plan. His objection was that his colleagues, Mr Beasley and Miss Sionis, had more theatre time allocated to them in their job plans than had been allocated to him.

28. Professor Ray and Mrs Wilkie explained cogently and clearly in their evidence that it is rare for Consultants' job plans to be the same. The Claimant accepts this is the case. There need to be different job plans to reflect different levels of direct client care for patients, current service needs and different specialties. The latter point was well illustrated by Mr Beasley's paediatric surgery expertise and Miss Sionis' involvement with robotic surgery.

29. The timetable set out in the Claimant's job plan was in accordance with the job as it had been advertised. It was based on service needs at the relevant time. The allocation of theatre time had been prepared by reference to the service needs of the ENT department and to complement the work of the other Consultants working in the Department. The Claimant had less theatre time than Mr Beasley and Miss Sionis. Theatre allocation equated to 2.211 PAs in the Claimant's job plan. This was a more favourable allocation of PAs then had appeared in the job advertisement. Mrs Wilkie had an understanding, and overview of all the Consultant activity and all the theatre PA time allocated in the ENT Consultants' job plans. There were eight Consultants in total working in the Adult ENT Service. Their theatre workload at that time ranged from 1.957 PAs to 2.73 PAs. The Claimant's allocation was within that range.

30. They continued to communicate with the Claimant about his timetable after he returned to Malaysia. Professor Ray and Mrs Wilkie concluded that they could not accommodate the Claimant's requests to remove a clinical session on Wednesday afternoon, provide a higher salary point and allow him to engage in private practice during SPA time. This was because it would not have been reasonable, or appropriate, to reallocate resources to meet the Claimant's demands when he had yet to establish a patient caseload within the ENT Department and had only been in his post for four or five weeks on terms and a job plan which had been shared with him well in advance.

31. On 16 April the Claimant indicated that he would be escalating the issue of the job plan to the Respondent's Medical Director within the job plan mediation procedure which had been explained to him. However, he did not submit his request for job plan mediation to the Respondent's Medical Director until 22 July 2020. He was requested to set out the nature of the disagreement with his Line Manager. When he had done so the Medical Director confirmed to him that mediation could, and would, be taken forward after he had returned to the UK.

32. When he returned to the UK he was requested to set out his case in writing. He submitted his written submissions on 11 February 2021. The Medical Director referred these written submissions to others internally for their comments. However, the mediation process could not be taken any further by the Medical Director because of the Claimant's resignation on 22 February 2021.

33. The Claimant made representations that he should be allowed to work remotely from Malaysia. This was carefully considered before this request was refused by the Respondent. This was because the Respondent had recruited the Claimant to meet an acute need in its ENT Department and this need had become more pressing by the delay in the Claimant's arrival to start work, and his ongoing absence. There was a real, and pressing, need for him to engage with the work he had been contracted to perform in the UK and Professor Ray and Mrs Wilkie needed him to return to do so as soon as possible.

34. The Claimant made the unsustainable assertion that 75% of ENT Consultants' work could be carried out at home. He attempted to justify

this assertion by reference to rosters which had been introduced by Professor Ray and Mr Yardley at the outset of the pandemic and which operated until July 2020. He maintained that the rosters demonstrated that Consultants were being allowed to work from home under the rostering arrangements.

35. There are some elements of a Consultant's role in the ENT Department which could be performed from home, in combination with attendance at the Hospital. However, the Respondent's evidence confirmed that the extent of that home working was very limited. Furthermore, Mrs Wilkie confirmed that no ENT Consultant made a request to work entirely from home and that it would not have been possible for them to do so. The Claimant's colleagues continued to attend the Department to undertake clinical work, including theatre time. Even when the pandemic was at its height, although theatre time was reduced it was never stopped completely and in-person clinics also continued throughout lockdown. The Department deals with cancer patients who are classed as high-priority patients. Its work for these patients continued throughout the pandemic and involved face-to-face consultation, investigations and operations. The Department required three Consultants to support its cancer service adequately as the business case for the Claimant's position had established. This meant that throughout the time that the Claimant was absent from work his two colleagues had to undertake an increased workload to maintain service to these patients which put an additional burden on them in already challenging times.

36. Mrs Wilkie and Professor Ray explained that clinical consultations often result in further action being needed for the patient. They gave examples which included investigations including endoscopy, radiological imaging, blood tests, as well as physical examinations and treatments and listing for surgery. The Claimant was not in a position to follow through with such patient care needs when residing away from his place of work for a long period when he could not attend the hospital and carry out necessary work there. Furthermore, the Claimant had no patient caseload or detailed knowledge of the Department and so there were limitations on the non-patient-specific work that could have been sent to him while, it would have been obvious to him, that such work would not have amounted to a full-time schedule of work or anything close to it.

37. The Claimant's reliance on the emergency arrangements made by the Respondent as a result of Covid to support his argument that he could have worked remotely from Malaysia sadly illustrated to the Tribunal how little he knew of his colleagues' circumstances at that time and the difficulties that they faced throughout that period; and the continuing necessity of attendance by his colleagues on patients on site; and the very real limitations of remote working and the methods by which Mr Yardley, in devising the roster sought to provide at least some respite and relaxation for his colleagues from the demands which the new and necessary practices introduced to combat Covid placed upon them, in addition to the impact of the absence of the Claimant.

38. The Claimant's claim of harassment relies on correspondence between him and Ms Kate Tranter, Medical HR Adviser. The Tribunal has been able to consider the correspondence between Ms Tranter and the Claimant in the

period from 24 June to 30 July 2020. In her email of 24 June Ms Tranter wrote to the Claimant in respect of his current period of sickness which commenced on 7 March 2020. She asked him to complete a consent form to facilitate a referral to Occupational Health and also informed the Claimant that upon closer inspection of the Electronic Staff Record the Respondent had realized the dates of continuous service used in calculating sick pay for the Claimant had been incorrect.

39. She explains that the outcome of this was that his correct sick pay entitlement was one month of full pay and that he could not receive any further sick pay from the Respondent. She explains that the error had led to a substantial overpayment to him in the net figure of £8,074.04. She expressed sincere apologies on behalf of the Respondent for this error. She then explained that the Respondent would look to recover the overpayment over a period of five months and asked the Claimant if he could confirm that he was in agreement to that arrangement so that she could instruct payroll accordingly and then confirm those arrangements in a formal letter.

40. In his reply the Claimant informed Ms Tranter that he could not agree to anything until he was back in Sheffield and that he needed to take advice as to the unusual situation which resulted in him being stuck overseas due to the pandemic which he considered was beyond his control, unprecedented and unexpected. He also indicated that he was still waiting for a job plan policy and an update on the clarification of his incremental date from Ms Tranter and also confirmed that he would be happy to attend on Occupational Health.

41. Ms Tranter replied to the Claimant on the following day. Her email states, inter alia, as follows:

> *"You are correct that Covid-19 has led to unusual circumstances; however we received a Doctor's note stating that you were medically unfit to work due to a reason other than Covid, and therefore normal sickness absence policy applies. There has been no change to our sickness management policy resulting from the pandemic."*

Ms Tranter then provides a link to UK Home Office Guidance regarding travel and states:

> *"I can see that commercial flights are running and that, there aren't any restrictions on leaving Malaysia at present. However, since you were declared medically unfit to work, the issue of travel restrictions is not applicable."*

42. The email then reads as follows:

> *"With regards to your break in service, since you last worked for the NHS in January 2018, this is a break longer than 12 months and therefore your sick pay entitlement is reset as per the Consultant Terms and Conditions (2003).*
>
> *You would need to explore the directorate as to whether there were any direct requests to undertake work for STH whilst on sick leave.*

Unfortunately I can't assist you with your job plan queries – job planning is dealt with by a different group of colleagues.

With regards to your incremental date – as Nicole advised, this has been taken from the date already determined by United Lincolnshire Hospitals NHS Trust. . . .

There is no need to wait until you return to the UK to refer you to Occupational Health. Currently they are doing all of their assessments via telephone, and have said that they can still assess employees who are abroad. Please could you complete the attached consent form so that we can begin this process.

I hope this helps answer some of your queries."

Ms Tranter sent a further email to the Claimant on 1 July 2020 which stated as follows:

"Apologies that I didn't get back to you yesterday. I was hoping to speak to my manager but she was busy all day.

I'm aware that your current fit note runs until 4 July (Saturday). If you are still unwell, then we would need you to provide a further medical certificate.

If you are now fit to return to work, we need to know what provisions you are making to return to Sheffield. As I mentioned in a previous email, the message from UK government is that British Citizens can return, and there are commercial flights running from Malaysia. Since you hold a UK passport you should be allowed to leave Malaysia on an outbound flight. Guidance from Malaysian airways states that "all visitors and foreign nationals ARE PERMITTED to leave the country".

Please could you confirm whether or not you are now fit to return to work in the UK, and if so, what steps you are taking to do so?

In addition, I still haven't received the signed OH consent form from you. Please could you send this as soon as possible.

Many thanks"

43. Ms Tranter wrote to the Claimant again on 7 July to answer further queries he had raised in correspondence. Her letter states as follows:

"Our process for anyone off sick for four weeks or more is to refer them to Occupational Health. I hadn't previously contacted you regarding this as I assumed it would need to wait until you returned to the UK, however, Occupational Health have stated that they can do an assessment for an employee overseas (since all of the their assessments are being done remotely anyway at present).

I am just preparing your contract now. It'll then be checked by my manager before being signed by the Chief executive. I can then

> *post it out to you. It will go to your UK address, but I am happy to also send an unsigned copy to you by email.*
>
> *Please do keep us updated with how you get on seeking permission to leave Malaysia if you need a confirmation of employment letter please let me know and I can prepare one for you".*

44. Ms Tranter wrote to the Claimant again on 17 July having reviewed previous correspondence and in particular an email from the Claimant to the ENT Department dated 10 March. She quotes from this letter and her email then states as follows:

> *"This is information that you have provided and clearly indicates that you are medically unfit. As a result, this has been recorded as sickness absence. In accordance with the Conduct, Capability and Ill Health policy we have responsibility to refer you to Occupational Health.*
>
> *I am in the process of seeking advice regarding how your current absence from work would be classified following the expiry of your medical certificate on the 4th July 2020. I am aware that you have requested to work remotely from Malaysia. Unfortunately we are unable to send you a Trust laptop and so therefore remote working is not feasible.*

Ms Tranter also informs the Claimant that she has reviewed the Immigration Department of Malaysia's website and sets out what it states in a "Frequently Asked Questions" document dated 9 July. Ms Tranter then explains:

> *"This confirms that effective from 09/07/20, you are permitted to travel if you can prove that you reside overseas. I have prepared a letter that confirms your permanent employment and your residence in the UK. In addition your contract has been checked and signed by the Chief Executive (copy attached). This will also confirm your residence in the UK.*
>
> *As Malaysian Government advice has recently changed please can you make all efforts to return to the UK".*

On 29 July in response to further correspondence and matters raised by the Claimant Ms Tranter set out a full response to all the queries that he had raised and the timeline as to when he commenced employment with the Respondent, the leave arrangements made in February 2020 and the other relevant dates she had previously referred to in correspondence with him.

45. She confirmed that his absence from 7 March to 4 July was being treated as sickness absence by the Respondent because he had provided a medical certificate stating that he was medically unfit. Ms Tranter also confirmed that his current salary position was that he was on unpaid leave and explained that he could request to use some of his annual leave during this time and outlined his current entitlement in her email. She responded to all concerns he had raised in clear, comprehensive and helpful terms.

46. On 31 July 2020 the Claimant confirmed that he was investigating returning to the UK on the first or second day of September 2020. HR informed Mrs Wilkie on 17 August 2020 that the Claimant had confirmed that he had a flight booked to return to the UK on 2 September 2020. Mrs Wilkie notified the ENT Department and asked them to make plans to organize the Claimant's timetable and clinical commitments. There was a backlog of work and high service demand as services returned to normal and substantial relief within the ENT team that they would have the benefit of the additional capacity that the Claimant could provide. However, on 31 August 2020 Mrs Wilkie was notified that the Claimant was not returning to work. Her understanding was that the Claimant had decided to remain in Malaysia because of concerns about travelling and the risk of infection. There were at that time no government restrictions preventing the Claimant from returning to work and it was his personal choice not to do so.

47. Mrs Wilkie was extremely concerned about the situation. Senior management had, understandably, started to doubt whether the Claimant intended to return at all. The Claimant remained on unpaid leave. His absence had not been granted or authorized. He had been fully advised that he could return to work but had chosen not to do so. This left his overall position as uncertain. This was an unsatisfactory position for the ENT Department, who continued to shoulder the burden of working without the desperately needed resource and skills that the Claimant could provide. It was eventually agreed that the Respondent's Chief Executive would write to the Claimant to seek to resolve this unsatisfactory position.

48. The Chief Executive sent a letter to the Claimant headed "Your contract of employment with the Trust" by email on 24 November 2020. This letter stated as follows:

> *"I understand that there has been extensive correspondence between you and the Trust concerning your prolonged unavailability to carry out any of the substantive duties of your post. However, unfortunately, it does not appear that you will be in a position to return to the UK and take up your contractual duties within a timescale that is acceptable to the Trust.*
>
> *It is therefore imperative that you contact Paula Eyre, Head of Medical HR, as soon as possible, giving a clear and unambiguous undertaking that you will make arrangements to return to the UK and attend the Trust, on or before Monday 4 January 2021 and will be in a position to perform the duties of your role fully and reliably from that date at the latest, subject to any quarantine period required by the UK government for those entering the UK from Malaysia. The Trust will of course offer you every reasonable support and assistance with any practical issues or difficulties associated with your return.*
>
> *If the Trust does not receive that undertaking from you by 4 December 2020 then, regrettably, the Trust will have no other option than to terminate your employment, on the basis that your contract has become incapable of being performed. If the Trust does not receive your undertaking, but for any reason you do not*

> *attend the Trust on Monday 4 January 2021, subject to any quarantine period as above, your employment will be terminated on that date.*
>
> *I am very sorry to have to write to you in these terms, but the Trust needs to ensure that it can provide its patients with a full time, reliable Head & Neck Oncology Service".*

49. On 30 November the Claimant requested an extension of time for his response to this letter. The Trust agreed to extend his response time by a week and allow him additional time to return, thus extending the deadline in the letter sent by the Chief Executive to 11 January 2021. Mrs Davidson received an email from the Claimant on 4 January 2021. In this email he suggested that he had thought the Covid-19 situation was finally over due to the availability of the vaccine but he had been disappointed with the news confirming that the UK Covid-19 situation had deteriorated. He requested the Trust to delay his return further. This request was considered with the Chief Executive. It was agreed that the Respondent needed the Claimant to return to work. There was a continuing requirement to deliver a high-quality ENT service and there was a pressing need for the Claimant's services to enable the Trust to continue to provide reliable care to its patients.

50. In her reply Mrs Davidson explains to the Claimant that the Trust had taken all recommended steps to ensure that staff were kept as safe as possible which included having appropriate PPE available, and that adaptations had been made to working practices and arrangements. She also reminded the Claimant of the voluntary vaccination programme that he was entitled to access. In his reply the Claimant confirmed that he understood the Trust's position and that he would seek to return to work before 11 January 2021.

51. Mr Yardley is currently a Senior Consultant ENT surgeon and the Clinical Governance Lead of the Respondent's ENT Department. He is responsible for co-ordinating the management of clinical and non-clinical governance in the ENT Department and within this role works in partnership with a number of multi-disciplinary teams to create an environment that is safe, caring, responsive, effective and well-led which delivers high quality care. He also volunteered to be the Covid-19 Lead for the ENT Department at the outset of the pandemic. He continues to work in that role which has involved responsibility for ensuring that the ward, outpatients and theatre areas are as safe as they possibly can be.

52. He provided detailed, and unchallenged evidence, of the Respondent's impressive response to the many challenges which the pandemic presented to the Respondent and all its staff. It is not necessary for the tribunal to detail Mr Yardley's evidence as to what steps had to be taken to combat the virus, the introduction of new arrangements for working, provision of PPE, training in all necessary areas together with putting in place an impressive range of support for staff testing and staff welfare. The evidence established that the Respondent was very proactive and responded to the demands of the pandemic extremely well. The Tribunal considered themselves fortunate to have been given such a compelling insight into the demands and the extent of the responses that had to be made by the Respondent and all that this achieved in maintaining its services and safe environments for its staff

and patients. It was undoubtedly a considerable achievement.

53. Mr Yardley explained that the ENT Department was designated as a high risk specialty in relation to Covid-19. This was due to the fact that its work involves dealing with the upper respiratory tract and many of the Department's diagnostic and therapeutic procedures are potentially aerosol generating procedures ("AGP"). The PPE provided for the Respondent for AGP is one of the highest specification. All staff had, and continue to have, access to mask-fitting procedures to ensure their PPE was correctly fitted to them and also have the use of FFP3 masks.

54. The Respondent's staff were also provided with lateral flow tests. It is mandatory to undertake those tests and report the results twice a week. Mr Yardley also explained how the Respondent's procurement team had to work very hard to ensure that adequate PPE was always available. He confirmed that at no time did the ENT Department run out of suitable highly specified PPE. Mr Yardley also informed the Tribunal that he had never been made aware of any concerns from staff about difficulty in accessing appropriate PPE after early 2020.

55. At no time after his return did the Claimant inform Mr Yardley that he did not have access to appropriate PPE including an FFP3 mask. The Claimant had requested protective glasses instead of a face shield or goggles when he returned to work in January 2021. Mr Yardley confirmed that these had been provided to him immediately. He does not accept that the Respondent had failed to provide the Claimant and others with appropriate PPE as the Claimant alleged. The Claimant did not challenge Mr Yardley's evidence on this point. The Tribunal finds that the fact that the Claimant could make such an unjustified allegation, calling into question a colleague's professionalism was both disappointing and not to his credit.

56. Mr Yardley was also involved in reducing the clinic numbers and clinic flows. He explained that outpatient and inpatient attendance dropped initially and that it was agreed that the clinics would be led by Consultants only to reduce the numbers in attendance on site. There had also been a period of time, in early March 2020, when elective routine appointments were suspended but they were put back in place shortly after that at reduced volumes in order to care for and protect the Respondent's patients. The Respondent also reduced the volume of face to face work but, due to the nature of the work undertaken in ENT, they were not able to reduce all face to face contact with patients. This included the emergency and cancer work undertaken by the ENT Department which continued throughout the pandemic and continued to require a level of face to face contact and attendance to undertake tests and procedures with patients. The Respondent commenced vaccination of staff in December 2019.

57. Mr Yardley also explained that although there are some areas within the Trust where staff had been able to work exclusively remotely, the ENT Department is not such an area. This is because unless a Consultant is able to be physically present and look down a patient's ear, nose or throat, he or she is unable to make a sensible decision about the correct course of action for that patient. Similarly, any invasive procedures require physical proximity to the patient. Therefore, whilst there were some

administrative tasks, and phone clinics, that could be undertaken remotely, this could only be a small part of a Consultant's clinical work.

58. When the Claimant returned to work for the Trust in January 2021, he was in isolation for the first two weeks in accordance with then current UK guidelines. He was able to spend this isolation time working through his emails and getting up to speed with the Respondent's Covid-19 updates and mandatory online training although the amount of such remote work was inevitably very limited. The Trust had implemented an offer of staff impact assessments for staff so they could discuss their own personal circumstances, the changes to working environment and whether any additional measures needed to be put in place in the work place for them.

59. The Claimant requested an individual staff impact assessment. This was undertaken at a meeting held with the Claimant which was chaired by Mr Yardley and attended by Professor Ray and the Respondent's Service Manager Mrs Morley. Professor Ray's notes of this meeting were available in the Agreed Bundle. The Claimant had completed the relevant form of assessment in advance and those present were able to work through the form with him.

60. The Claimant confirmed that he did not have any underlying health conditions but did raise a concern that he was at a higher risk due to his ethnicity. This level of risk was discussed with him. When the Claimant was asked if he had been offered a vaccination he confirmed that his GP had offered him a vaccination which he had declined.

61. The Claimant was also provided with details of Q Risk assessments. These were an additional risk assessment that staff could opt to have through the Respondent's Occupational Health Service if they felt they were at higher risk. It was explained to the Claimant this was an assessment which he should take steps to arrange if he felt this would assist him. The Claimant did so but after he had tendered his resignation. The assessment was undertaken with him. It confirmed that he was at low risk.

62. The Claimant had also stated on his form that he lived with his father-in-law who was then 81 years old. However during the meeting the Claimant confirmed that he actually lived alone in Sheffield and his father-in-law lived in Lincoln. He also suggested that his travel to work arrangements did not meet the safety requirements. However, it transpired he was referring to the fact that he had flown back to the UK. As far as his every day commute into work was concerned he confirmed this did not give rise to any concerns or issues for him.

63. The Claimant also confirmed that he had undertaken the video tutorials on donning and docking of PPE. He said he was satisfied with the PPE that was available to him. He also confirmed that he had completed his masking fitting test. Furthermore, he confirmed to those present that he was generally happy and satisfied with the workplace and felt comfortable with it. After this assessment Professor Ray did not consider there were any specific changes necessary for the Claimant's working arrangements. Mr Yardley and Professor Ray were satisfied that he had access to all of the necessary measures to protect him at work and was not at an unacceptably

higher risk than others.

64. The Tribunal has already recorded above that when the Claimant returned to work in January 2021 he still did not agree with the proposed job plan that had been under discussion since the start of his employment at the beginning of the previous year. This was referred to job plan mediation and in an email dated 11 February 2021 the Claimant set out his comments on the job plan and the issues he wished to raise with it. On 16 February Professor Ray was contacted by the Respondent's Deputy Medical Director and asked to give due consideration to the six points which the Claimant had raised in respect of the proposed job plan. These points were under consideration by Professor Ray and Mrs Wilkie when the Claimant tendered his resignation and the job plan mediation was not completed for that reason.

65. Mr Yardley was present at the assessment meeting. He had noted that the Claimant considered himself to be at higher risk due to his ethnicity. Mr Yardley was aware of national guidance issued in May 2020 which identified that BAME staff were recognized as being in the group of staff who were at higher risk that others and the guidance from Public Health England that different ethnic groups were at higher risk of contracting, and becoming ill, from Covid-19. He was satisfied that due account had been taken by the Respondent of those risks and that it had taken various steps with which he was directly involved to protect staff across the Trust and specifically within ENT.

66. He explained that a large proportion of the Respondent's medical staff are BAME. The vital need was to ensure that all staff had access to the correct PPE and worked within procedures that reduced the potential exposure to Covid-19 for them and all other staff. Mr Yardley explained to the Claimant that he could access the Q risk assessment already referred to above. He explained to the Claimant that if it was found as a result of that assessment that he was at particularly higher risk due to an underlying health condition, which would suggest he needed to shield, then this would be discussed with him and arrangements would be put in place to support him as with all other staff working for the Respondent.

67. Mr Yardley had not been aware that the Claimant had asked for such an occupational health assessment. He only saw this assessment after the Claimant had left his employment. He noted, as had Professor Ray, that the assessment confirmed that the Claimant was classed as low risk.

68. The Claimant tendered his written resignation to Professor Ray on 22 February 2021. He requested Professor Ray to accept his letter as formal notice of his resignation. He set out no reasons for tendering his resignation. A mutually acceptable departure date was subsequently agreed with him.

69. It is not disputed between the parties that at the date of his resignation, the Claimant had received a net overpayment of £8,409.54 (£13,344.42 gross) by reason of overpayment of sick pay and a late notification of unpaid leave. Mrs Davidson wrote to the Claimant on 19 March 2021 to request the Claimant to confirm how he wished to repay this overpayment. The

Claimant responded to suggest that no action should be taken in relation to this overpayment on the basis that it was part of the ongoing tribunal claim which he had issued against the Respondent.

70. The Clinical Excellence Awards ("CEAs") recognize and reward exceptional, personal contributions to the NHS by Consultants through a scale of awards payments. The CEA scheme is intended to recognize and reward those Consultants who contributed over and above their job plan, towards the delivery of safe and high-quality care to patients and to the continuous improvement of NHS services, including those who do so through their contribution to academic medicine. Due to the pandemic it was agreed that the normal 2020-2021 local CEAs round in England would be halted because of exceptional circumstances due to Covid. It was also agreed that the fund which was usually allocated by the CEA award scheme would be divided equally between all eligible Consultants as a one-off, non-consolidated payment.

71. Therefore, the Respondent accepts that the Claimant was due to receive a payment for the 2020-2021 round and that the Trust made payments in lieu of these CEA awards for 2021 in December 2020 when each full-time Consultant received £2,231.05. Mrs Davidson explained that the Claimant's name was initially missed off the list of Consultants for the CEA award. Her evidence is this was a genuine error. This was not challenged by the Claimant and the Tribunal accepts Mrs Davidson's evidence on this point. A similar error had occurred with another Consultant who had an incorrect payroll number quoted and was missed off the list initially for that reason.

72. Mrs Davidson explained that by the time this came to light the Claimant had resigned from his position and still owed the Trust a significant amount of money because of the overpayment made to him. The Respondent therefore opted to recover part of this overpayment by withholding the Claimant's CEA payment. The offsetting of this one off non-consolidated payment was explained to the Claimant by Mrs Davidson in an email she sent to him on 6 May 2021.

73. Mrs Davidson explained that Consultants are often required to take part in an on-call duty rota. If a Consultant is on call then he / she can be required to either work or give advice over the phone, outside normal working hours and at short notice, to deal with urgent or emergency issues. A Consultant's participation in the on-call rota is remunerated in two ways: an on-call availability supplement is paid at a percentage of the basic pay to each Consultant on the rota dependent on how many Consultants are on the on-call rota. This is to compensate them for their availability. In addition, if a Consultant on-call is contacted by the Respondent, and is required to give advice by telephone, or attend the Respondent to deal with an issue they are entitled to receive and additional payment for the time spent on that activity.

74. The Respondent agrees that the Claimant agreed to cover an on-call period for a colleague who was on sick leave. It is not disputed between the parties that the on-call period in question began at 1300 on 3 February and went through until 0900 on 4 February. The Claimant has claimed 20 hours pay for the whole period. However, the Tribunal accepts Mrs Davidson's

evidence, which is supported by the documentation referred to it, that the Claimant was properly and appropriately remunerated for a total of two Programmed Activities ("PAs") on the basis of one PA for being resident from 1300 to 1700 on 3 February and then one PA for his availability to be called in, if required, from 1700 – 0900.

75. In accordance with established contractual arrangements if the Claimant had been called into the hospital or given advice over the phone then the Respondent would have expected to receive a claim which set out when he was called and when the work / advice ended and in such circumstances the Claimant would have been paid for that work based on the time he was involved in undertaking the work. However, the form submitted by the Claimant confirms that he was claiming an hourly rate for the whole of the on-call period irrespective of whether or not he was called in. The undisputed evidence of Mrs Davidson supported by the documentation she has referred to, establishes that the Claimant was paid correctly for his period on-call on 3-4 February 2021 and his claim on 25 February 2021. The Claimant received payment to which he was entitled for all the hours which he worked on those days. His claim otherwise is unsustainable and is dismissed.

The Law

76. Section 13 of the EqA prohibits direct discrimination "because of a protected characteristic". Section 13(1) provides that an employer directly discriminates against a person if:

- **it treats that person less favourably than it treats or would treat others, and**
- **the difference in treatment is because of a protected characteristic**.

The Claimant's claim of race discrimination is that he was treated differently as a Chinese / Malayan person with a private practice in Malaysia. The protected characteristic is race.

77. Employment Tribunals will often deal with the two stages set out above in turn. However, it is not always possible to separate the two issues. The case of **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR337** explains that the "less favourable treatment issue" cannot be resolved without, at the same time, deciding the reason why issue because these issues are so intertwined. However, once a claimant shows prima facie evidence from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the tribunal is obliged to uphold the claim unless the employer can provide an explanation that shows that it did not discriminate.

78. The fact that a claimant believes that he or she has been treated less favourably than a comparator (whether actual or hypothetical) does not of itself establish that there has been less favourable treatment. The test is an objective one. However, a claimant's perception can have a significant influence on a Tribunal which has to determine whether less favourable treatment has taken place. In order to claim direct race discrimination under

s.13 the Claimant has to establish that he has been treated less favourably than a comparator who is in the same, or not materially different, circumstances as him. If there are no actual comparators then it is necessary for this Tribunal to consider how a hypothetical comparator would have been treated.

79. In the case of **Shamoon** Lord Nicholls pointed out that there will "usually be no difficulty in deciding whether the treatment… was less favourable than was, or would have been, afforded to others". His Lordship viewed the issue as essentially boiling down to a single question: Did the complainant, because of the protected characteristic receive less favourable treatment than others?

80. The general definition of harassment is set out in s.26(1) of EqA. It states that a person (A) harasses another (B) if:

    - **A engages in unwanted conduct related to a relevant protected characteristic – s.26(1)(a); and**

    - **the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B – s.26(1)(b)**.

81. There are three essential questions to be considered by this Tribunal in respect of the Claimant's harassment claim under s.26(1):

    - **Was there unwanted conduct?**

    - **Did it have the purpose or effect of violating the Claimant's dignity or creating an adverse environment for him?; and**

    - **Was this conduct because of his race?**.

82. The Claimant pursues a claim of constructive dismissal within s.95(1)(c) of the Act. This states that there is dismissal when an employee terminates his / her contract of employment, with or without notice, in circumstances such that he / she is entitled to terminate it without notice by reason of the employer's conduct.

83. It is well established that for an employer's conduct to give rise to a constructive dismissal it must involve a **repudiatory breach of contract**. In order to claim constructive dismissal the Claimant must establish that:

    - **there was a fundamental breach of contract on the part of the Respondent;**

    - **the Respondent's breach caused the Claimant to resign; and**

    - **the Claimant did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal**.

84. The contractual terms of a contract of employment may be either express or implied. Express terms are those which have been specifically agreed between the parties, whether in writing or under an oral agreement. Implied

terms are those that exist either because of the nature and circumstances of the contract itself, or because the law states that such a term is to be implied in the particular circumstances under consideration. A term of trust and confidence between an employer and employee is implied into a contract of employment.

85. An employer must 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. There will be no breach of this implied term simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If on an objective approach there has been no breach, the employee's claim will fail. However, it is enough that the repudiatory breach was an effective cause of an employee's resignation rather than being the effective cause of it for such a claim to succeed.

86. An employer's conduct can cumulatively amount to a fundamental breach of contract and in those circumstances an employee is entitled to resign and claim constructive dismissal following what is referred to as a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract. However, the last straw incident must contribute, however slightly, to the breach of the implied term of trust and confidence. This means that an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as destructive of his / her trust and confidence in his / her employer. Each case turns on its own facts with regard to what may, or may not, amount to a repudiatory breach of contract.

Conclusions

87. The Claimant's claims of race discrimination rely on a hypothetical comparator in respect of the refusal of the Claimant's request for remote working in Malaysia; and two named comparators in respect in particular of the allocation of theatre time in the Claimant's job plan. The refusal of remote working was principally because the Respondent had a pressing need for the Claimant to resume his work in the Hospital as soon as possible, and those managing him knew that he was able to return to the UK to do so. Furthermore, as our findings of fact confirm the Claimant could only have undertaken a very limited range of work in Malaysia which would not have provided significant, or the necessary support the ENT Department needed from him. There is no evidence before the Tribunal to support the assertion that the refusal of his request to undertake remote working was because he was Malaysian / Chinese or that a Caucasian clinician would have been treated differently by the Respondent.

88. The Tribunal are also satisfied that the Claimant's claim that the difference in theatre time in his job plan compared to the job plans of his two colleagues, Mr Beasley and Miss Sionis is because of his race has no merit. The Claimant's theatre time allocation was slightly more than anticipated in the indicative timetable which had been provided to him by the Respondent when he applied for the job. He received the allocation he had contracted for and his theatre time fitted within the original indicative timetable in the job description and was also within the range of theatre time for Consultants

generally in the ENT Department. The Claimant has not challenged the reasons for the disparity which were explained by Mrs Wilkie. A Consultant's specializations and particular expertise and experience determines his/her theatre time as demonstrated by the factors taken into account to allocate theatre time to Mr Beasley and Miss Sionis. There is no evidence before us to support the allegation that there was a racial motive in the theatre time allocated to the Claimant or any other aspect of the indicative timetable and job plan provided to him. The Claimant was made aware that there was a job plan mediation procedure through which he could challenge the job plan that had been offered to him. He duly did so and the Respondent dealt appropriately and reasonably with his representations until his resignation.

89. We now deal with the claim of harassment. The correspondence between the Claimant and Miss Tranter, a junior member of the Respondent's HR Team, does not support his claim of harassment. Miss Tranter did not pressurize the Claimant to take sickness leave. Miss Tranter explained the two options that were available to the Claimant: to confirm his plans to return to the UK if he was fit to do so, or if he was still too unwell to travel to provide medical certificates to the Respondent to confirm this.

90. These were matters which the Respondent had to address with the Claimant and which Miss Tranter had been instructed by those who managed her to address with him. The reason why those matters were raised with him is obvious and had no connection with his race. Furthermore, there was no unwanted conduct. Steps taken by Miss Tranter were necessary, and undertaken reasonably by her, and did not have the purpose or effect of violating the Claimant's dignity or creating an adverse environment for him. The claim of harassment by reason of the Claimant's race fails.

91. During the course of the hearing the Claimant informed the Tribunal that he had always accepted, firstly, that the Respondent had made an overpayment of sickness pay to him which he would have to repay; and, secondly, that he was on unpaid leave from 4 July 2020 and knew that he was not entitled to any payment of wages from the Respondent until he resumed working in the UK. He also accepted that his earnings in his private practice resulted in him suffering no loss of income during his residence in Malaysia. He earned substantially more during that period than he would have been paid by the Respondent.

92. The findings of fact confirm that the Claimant's claim of breach of contract for unpaid wages from 6 June 2020 – 10 January 2021 is unsustainable and must be dismissed. The Claimant was not entitled to any payment under the NHS Guidance on which he relies for the reasons explained by Mrs Davidson. He has also accepted that he was not entitled to be paid any wages during this period of time. He knew that he was on unpaid leave because he had chosen not to return to the UK, although he was able to do so. He continued to earn substantial sums in his private practice. He suffered no financial loss. He could have claimed no damages from the Respondent for the alleged breach of contract.

93. The Claimant's claim under s.44 of the Act requires us to consider whether he was subjected to detriments because he refused to attend work in circumstances of danger which he reasonably believed to be serious and imminent. His case is that he was not paid from 1 June 2020, not awarded his CEA award and received an ultimatum to return from work from the Respondent which required him to return to his duties or have his employment terminated because of written representations he made in particular about Covid-19 and its impact on the BAME community particularly in his email of 21 July 2020. We considered each of the alleged detriments in turn to determine whether such a claim was sustainable on the evidence which has been presented to us.

94. The Claimant was not paid because he was not prepared to return to the UK when the Respondent genuinely, and correctly, believed he could do so. He has also confirmed to the Tribunal that he knew he was on unpaid leave and accepted that he was not entitled to be paid until he returned to work, and that he would have to repay the overpayment of sick pay which had been made to him by the Respondent.

95. The Claimant was awarded the CEA. The Respondent considered it was entitled to set the sum he received for that award against the overpayment which it had made to him and duly did so. The Claimant's failure to return to the UK in August and following that the continuation of his unpaid leave could not continue indefinitely with the substantial pressures on the Respondent's ENT Department. The Chief Executive had no alternative but to give the Claimant the choice set out in the letter of 24 November. This enabled him to return to the UK if he wished to do so and set a date by which he should do so, after which the Respondent would have been able to commence recruiting a replacement for him if he did not return.

96. These actions by the Respondent were unconnected to the representations the Claimant had made as to Covid-19. The Claimant's claim fails and is dismissed for that reason. Furthermore, although it is not necessary for us to do so, the Tribunal records that the Respondent's actions were not detriments. The Claimant had no contractual entitlement to pay during his absence, or any claim within the terms of the relevant NHS Guidance which he relied upon. He received the CEA award with others who were also entitled to it and the Chief Executive's letter gave him the choice to return to his job if he wanted to do so.

97. If it had been necessary to do so the Tribunal would have found that the Claimant was in no position to form any reasonable belief as to whether he was at risk of serious and imminent danger if he returned to work for the Respondent in the UK. He could only have done so by returning to take up self-isolation, which would have provided him with direct knowledge of the extensive precautions and procedures which the Respondent had taken to protect its staff from Covid-19 (with a particular focus on its BAME staff) who were fighting Covid-19 on behalf of the country at large. This would have confirmed the steps which Mrs Davidson explained to him before his return to the UK.

98. The Claimant relies on five claims to pursue his claim of unfair constructive dismissal. He also claims that if he is found to have been constructively

dismissed then it was because of his race. The Tribunal has found that the Claimant was not discriminated against, or harassed, because of his race. It has found that there was no basis for him to pursue a claim that the Respondent had acted in breach of contract by failing to pay him between 1 June 2020 and 10 January 2021. Furthermore, the letter sent to him on 24 November was a reasonable and necessary step for the Respondent to have taken at that time, and could not be said to have been destructive of trust and confidence.

99. The Claimant did undertake a risk assessment when he returned to the UK. The Tribunal has read in correspondence in the Bundle that when the Respondent knew that the Claimant was going to return Mrs Davidson explained to him issues about staff well-being, safety, PPE and working practices. The Claimant did not, at that time, raise any concerns about requiring certain steps (whether a risk assessment or otherwise) to be taken prior to his arrival in the UK.

100. The Claimant had to go into self-isolation for 14 days after his return to the UK before resuming work at the Hospital. The Tribunal accepts the Respondent's evidence that the appropriate time for carrying out the risk assessment was on the Claimant's return to work, and that all appropriate steps to address his safe return into the workplace were taken by the Respondent at that time. These arrangements were not destructive of trust and confidence. The Claimant was asked about what PPE he required on his return to the UK. He identified the need for protective glasses. These were provided to him. Furthermore, he had raised no issues with the provision of PPE either to him, or others, by the time of his resignation.

101. The Tribunal note that the Claimant did raise problems with his goggles and submitted a report about an incident with them but this was more than three weeks after his resignation. He also made reference under cross-examination to a second incident with the protective goggles which also occurred after he had submitted his resignation. These incidents could not have contributed to, or played any part in, his decision to resign. Furthermore, even if such incidents had occurred before the Claimant's resignation, the Tribunal, looking at all the circumstances at the relevant time from an objective perspective has concluded that these incidents would not have been destructive of trust and confidence.

102. The Tribunal finds that the Respondent's conduct towards the Claimant, and the actions taken by its managers to address matters he raised and his position generally, from when he started work at the Hospital until his resignation, including their grant of exceptional leave to him, their communications with him, and actions taken by them, during his absence in Malaysia and in respect of his return to the UK in January 2021 did not give rise to any repudiatory breach of the Claimant's contract of employment by the Respondent. This is the case whether the managers' conduct and actions are considered separately or collectively. There was no fundamental breach of any express or any implied term of the Claimant's contract of employment. The Respondent acted reasonably throughout the Claimant's employment. It did not act in a manner likely to destroy, or seriously damage, the implied term of trust and confidence in the Claimant's contract of employment with the Respondent. The Claimant resigned. He did not

terminate his contract of employment with the Respondent in circumstances in which he was entitled to terminate it without notice by reason of the employer's conduct. His claim of constructive dismissal is dismissed. He was not dismissed by reason of his race.

103. The Tribunal finds by reference to documents in the Agreed Bundle and Miss Tranter's correspondence that the Claimant did receive appropriate written particulars of his employment from the Respondent within s.1 of the Act. There is, in any event, no freestanding right to be provided with written particulars. This claim could only have succeeded if the Claimant had succeeded in any claim within schedule 5 of the Employment Act 2002. He has not succeeded in any of his other claims.

104. The Tribunal has dismissed all the Claimant's claims in these proceedings for the reasons which have been set out above.

Employment Judge Craft

Date: 28 September 2022